(22,295.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 376.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT L. HARRIMAN AND ALBERT C. HARRIMAN, COMPOSING A FIRM AND COPARTNERSHIP OF HARRIMAN BROTHERS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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1 & 2 *Caption.*

STATE OF TEXAS,
Grayson County:

At a regular term of the Honorable District Court, Fifteenth Judicial District, Grayson County, Texas, which was begun and holden at the Court House thereof in the City of Sherman, Texas, on the 4th day of January, 1909, and which adjourned on the 3rd day of April, 1909, the Honorable B. L. Jones, Judge thereof presiding, the following proceedings, among others, were had, to-wit:

Plaintiff's First Amended Original Petition.

Filed 2, 9, '09.

In the District Court, 15th Judicial District.

No. 17838.

HARRIMAN BROTHERS
vs.
M., K. & T. RY. CO.

STATE OF TEXAS,
County of Grayson:

Now come plaintiffs and after obtaining leave of the Court file this their first amended original petition in lieu of their original petition filed the — day of ——, 1908, as follows, to-wit:

To the Hon. B. L. Jones, Judge of said Court:

That plaintiffs are citizens of Cooper County, Missouri, doing business under the firm name and style of Harriman Bros., and defendant is a private corporation duly incorporated under the laws of the State of Kansas, owning and operating lines of
3 railway in said state, the State- of Kansas, Oklahoma and Texas, as a common carrier of passengers and freight for hire.

That heretofore, to-wit: On or about the 30th day of January, 1907, plaintiffs delivered to defendant at Pilot Grove, Missouri, a station on one of its lines of railway, thirteen head of fine show and sale cattle to be by it transported to Enid in the State of Oklahoma, and at the same time paid to defendant the tolls and charges for such service. That plaintiffs at the same time delivered to defendant certain herdsman's tools, blankets, halters and other equipment used in and about the handling of said cattle. That defendant accepted and received the property above mentioned in its capacity of a common carrier and as such, undertook its transportation from and to the points above mentioned.

Plaintiffs show to the Court that said defendant failed to comply with its said undertaking in that: near the station of Nevada, in the State of Missouri, the train upon which said cattle were being transported was wrecked, and each and all of said cattle killed and the equipment of plaintiffs on said train was lost and destroyed.

Plaintiffs show to the Court that said wreck was caused by the gross negligence of defendant in this: said defendant was negligent in that its roadbed was in a bad state of repair and a certain bridge over which said railway was constructed was old, decayed and insufficient to bear the weight of said train so that said train was derailed and precipitated through said bridge.

That the operatives of said train were guilty of negligence in that said train was run at a high, excessive and dangerous rate of speed, causing the same to be derailed.

That the equipment including the cars, brakes, brake-beams, brake shoes, their hangings and fastenings were old, worn and out of repair so that some portion thereof became detached
4 and falling upon the track caused said train to be derailed.

That said defendant was further guilty of negligence in that it failed to properly inspect and repair its said road-bed, bridge, cars, braking appliances, the hangings and connections thereof, and plaintiffs charge that if it had used ordinary care the defective conditions would have been discovered and would, in the exercise of ordinary care have been repaired.

Plaintiffs show to the Court that each and all of the cattle aforesaid, were cattle of the highest grade, breed and quality and were very valuable, all of which facts were well known to defendant. That said cattle were of the reasonable value, were worth and their reasonable cash value was the sum of ($15000) Fifteen Thousand Dollars, and said equipment was of the reasonable value of One Hundred ($100.00) Dollars.

That by reason of the loss and destruction of all the *the* property above mentioned, through defendant's negligence as hereinbefore alleged, plaintiffs have been damaged in the sum of $15,100.00, which though demanded of defendant it has refused to pay.

Premises considered, plaintiffs sue and pray that said defendants — duly cited through its local agent, George Stoner, to answer this petition and that on final hearing hereof, they have judgment for their said damages, interest and all costs of suit.

W. M. WILLIAMS,
WOLFE, HARE & MAXEY,
Attorneys for Plaintiffs.

Filed Feb. 9-1909. K. S. Loving, Cl'k D. C.

5 *Defendant's First Amended Original Answer.*

Filed 2, 8, '09.

In the District Court, Grayson County, Texas, 15th Judicial District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Now comes the defendant and with leave of the court files this its first amended original answer: and says:

First. Defendant demurs generally to plaintiff's petition because the facts therein alleged show no cause of action.

Second. Defendant demurs especially to plaintiff's petition because:

(1) It is too general, vague, and indefinite in stating the acts of negligence and where the same occurred.

(2) It is too general, vague and indefinite in stating the extent and amount of the damage and injury to plaintiff's cattle and to each head thereof.

(3) Because said petition does not show whether the contract between plaintiff and defendant, whereby defendant undertook and promised to transport and deliver said cattle, as alleged, was in writing or was verbal.

(4) Said petition does not show whether or not plaintiff relies upon and seeks recovery under, and defendant's liability regulated by the Act of Congress of the United States, passed June 29th, 1906, entitled "An Act to amend an act entitled 'An Act to regulate commerce,' approved February 4th, 1887, and all acts amendatory thereof and to enlarge the powers of — interstate commerce commission."

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Third. Defendant for general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

HEAD, DILLARD, SMITH & HEAD.

6 Fourth. Defendant says that the contract by and between plaintiff and defendant with reference to the carriage of said stock was in writing, duly executed by all of the parties to this suit, acting for themselves or by their duly authorized agents, in the State of Missouri, by the laws of which state, said contract was and is in all its provisions legal, binding and valid; that said contract was for the transportation of said cattle from Pilot Grove, Missouri, to Guthrie, in what was then Oklahoma Territory, now Oklahoma State; which shipment therefore constituted interstate commerce and said contract was for the transportation of interstate commerce, and by the laws of the United States governing interstate commerce was and

is in all its provisions valid and binding; that in said contract, among other things, it is stipulated as follows:

"This Company Has Two Rates on Live Stock.

Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate which is hereby agreed to, accepted and understood to be less than published rate applying thereon when transported at carrier's risk.

All kinds of live stock, carrier's risk, will be taken under the provisions and at rates provided for by existing tariffs and classification."

"This agreement, entered into by and between the Missouri, Kansas & Texas Railway Company, and each carrier adopting it, hereinafter called the carrier, party of the first part, and Harriman Bros. hereinafter called the shipper party of the second part, this 30th. day of Jan'y, 1907, Witnesseth: The carrier agrees to let to the shipper one stockcar, numbered 51476 P. M., which the shipper has selected and desires to use for the shipment of 13 head of cattle consigned to Harriman Bros. at Enid, Okla., and when loaded and delivered to carrier to haul the same, together with the shipper, party or parties in charge thereof, from Pilot Grove, Mo. to Guthrie, Okla., al- as hereafter provided at the rate of (Do not insert any station beyond our line.) — ddollars per car, or — cents per hundred pounds, from — to destination, subject to minimum weights and length of cars provided for in tariff, the same being a special rate, which the carrier guarantees, and less than the regular tariff rate applying on shipments of live stock not covered by this special contract.

7

5. The carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting from his negligent doing or failure to do any of the things which he hereby contracts to do, or from the negligence of any of his servants.

8. The carrier does not ship live stock or Emigrant Outfit under this contract or at the rate hereon given upon which its liability, in case of any loss or injury, shall exceed the following prices per head:

Each Horse (gelding, mare, stallion) Mule or jack	$100.0
Each pony or range horse	30.
Each Ox, steer or bull	30.
Each cow	20.
Each calf or hog	7.
Each sheep or goat	2.

Emigrant Outfit (not Live Stock) consisting of Emigrant Movables, Household Goods, Second Hand Farm Machinery, etc., when

loaded with Live Stock, as per classification at valuation of
8 not to exceed $5.00 per one hundred pounds in case of loss or damage, and said shipper represents and agrees that his sai- live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation or handling of said cars as aforesaid it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, that shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above.

9. The shipper further expressly agrees that as a condition precedent to his right to recover any damages for any loss or injury to said live stock resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train or the nearest station or freight agent of the carrier on whose line the injurie- occur before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed fro- pens at destination. In his notice he shall state place and nature of the injuries to the end that they may be fully and fairly investigated, and said shipper shall within thirty days after the happening of the injuries complained of, file with some freight or station agent of the carrier on whose line the injuries occurred, his claim therefor, giving the amount, shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action fo- any injuries resulting to said live stock as aforesaid, and no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute of limitation to the contrary notwithstanding, and no damages can be recovered except those set forth in the required notice and claim."

9 No agent of this company has any authority to waive, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do.

Defendant says that plaintiff has wholly failed to give defendant, or any of the agents or persons set forth in said contract the aforesaid notice in writing, of his claim for damages as stipulated in said contract, and especially did he fail to give such notice within 30 days as required therein, except that he did give notice as required within said time, but shortly thereafter took back said notice from defendant, withdrew and retracted same, and the same did not therefore constitute notice as provided for by said contract.

Defendant says that plaintiff did not institute this suit or any suit on account of loss or injury to said live stock withi- 90 days, as required by the provi*d*ions of said contract, and he is therefore barred from maintaining this suit and defendant pleads such in bar hereof.

Defendant says that there is no statute or law in the State of Missouri, in any way invalidating or effecting the validity of said provision requiring the bringing of said suit within said time, or of said

provision requiring plaintiff to give notice of his claim for damage as provided for in said contract.

Defendant says that said stock were not injured or damaged in any way by negligence upon its part but that the same were killed in a wreck of one of its trains in the course of transportation
10 over its road, which wreck was not in any way due to any negligence upon the part of the defendant or any of its agents or employés, but was due solely and only to an unavoidable accident, which could not have been foreseen or prevented by the exercize of due care and diligence on its part.

Defendant says that if it be held liable to plaintiff in any amount, which it denies it should be, then it says that in any event, plaintiff is not entitled to recover, and cannot recover from it any more than the amounts agreed upon as the values of said stock in said contract; that under said provision of said contract said cattle were of the total value of Four Hundred and eighty ($480.00) Dollars, which is the largest amount plaintiff can recover therefor of defendant in any event.

Defendant says that said contract was entered into by and between parties for a valuable consideration, and was and is in all its provisions reasonable and plaintiff could easily have complied therewith on his part, had he desired or seen proper so to do.

Wherefore defendant prays to be discharged with its costs.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

I, Herbert Morris, on my oath state that I was one of the Claim Agents for the defendant, Missouri, Kansas & Texas Railway Company, at the time of the occurrence of the matters and things set forth in the foregoing answer; that I am qualified to make this affidavit; that the allegations made in the foregoing answer denying the giving of notice by plaintiff to the defendant are true.

HERBERT MORRIS.

11 Subscribed and sworn to before me this 12th day of February, 1909.

[SEAL.] M. B. OSLIN,
Notary Public in and for Grayson County, Texas.

Filed Feb. 8th, 1909, K. S. Loving, Clerk D. C.

Plaintiffs' First Supplemental Petition.

Filed 2, 8, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
VS.
M., K. & T. Ry. Co.

Now comes the plaintiffs and after obtaining leave of the Court, filed this their first supplemental petition in reply to defendant's

first amended original answer filed herein on the 8th day of February, 1909, as follows, to-wit:

1st. Plaintiff- excepts to all of the allegations in said answer and say that the same shows no valid defense to their cause of action and of this they pray the judgment of the court.

2nd. Plaintiff- specially excepts to the allegations in said answer wherein it is alleged that the contract entered into between plaintiffs and defendant *were* legal and binding under the laws of the State of Missouri, because said allegation- *is* too general and *does* not state what particular portion- of said alleged contract were valid and binding under the law- of said State.

12 3rd. They specially except to that allegation in said answer wherein it is charged that said alleged contract was valid and binding under the laws of the United States governing interstate commerce because said allegation is too general and does not state what portion of said contract *are* valid and binding under said law-.

4th. Plaintiff- specially excepts to that portion of said amended original answer setting up that the alleged contr*t*ract was the contract for interstate shipment because there is no allegation in said answer that said defendant had complied with the laws of the United States, or that *they* had filed any schedule of charges regulating or governing said shipment, and further fails to allege a compliance by defendant with the rates so filed with the interstate commerce commission.

5th. Plaintiffs specially except to all the allegations of said answer setting up that portion of said alleged contract providing that all kinds of live stock will be taken at carrier's risk under the provisions and at rates provided for by existing tariff and classification because nowhere in said answer is there any allegation that said defendant then had any existing tariff or classification, nor are there any allegations as to what said alleged existing tariff and classifications were.

6th. Plaintiffs specially excepts to all that portion of said answer which sets up that they had one rate which was charged for the shipment of said stock at the owner's risk and another and different rate when the same were transported at defendant's risk because said rates are not set up in said answer nor alleged, nor is it shown that the same were in conformity with a schedule of rates

13 filed by said defendant with the interstate commerce commission, nor is there any allegation that said defendant had filed any rate whatever with said commission.

7th. Plaintiffs specially except to the allegations of said answer quoting from said alleged contract to the effect that defendant agreed to haul said live stock from Pilot Grove, Missouri, to Guthrie, Oklahoma at the rate of — dollars per car or — cents per hundred pounds from — to destination subject to minimum rates and cars provided for in tariff, the same being a special rate which the carrier guarantees and which is less than the regular tariff rate applying on shipments of live stock not covered by this special contract, because what said special rate was is not alleged and if there was any other rate, it is not alleged, and if said provision of said contract was inserted under or by virtue of any tariff or schedule of rates filed with

the Interstate Commerce Commission, the same is not alleged nor is there any allegation as to what such charges were under any rates or schedule filed with said Commission.

8th. Plaintiffs except to all that portion of said answer setting up the contents of the eighth provision of said alleged contract wherein it has attempted to limit its liability to a certain amount per head for the stock alleged to have been killed by it because it is not shown that said limitations were contained in any tariff or schedule of rates filed by it with the Interstate Commerce Commission, nor is there any allegation which shows or tends to show that defendant has a legal right to make such rate or limitation.

14 9th. Plaintiffs further except to said last allegation for the reason that it is not shown by nor alleged in said answer that such limitations or restrictions of its liability were contained in or warranted by any tariff or schedule of rates filed by the defendant with the Interstate Commerce Commission.

10th. Plaintiffs further except to all that portion of said answer setting up as a defense herein that portion of sai- alleged contract whereby defendant attempts to limit its liability for the stock killed because said portion of said contract is illegal and void under the laws of the United States regulating Interstate Commerce, all of which plaintiffs pray the judgment of the Court.

11th. For special reply to the matters and things set up in said amended answer plaintiff- says:

It is not true that these plaintiffs failed to give said defendant notice in writing of their claim for damages sued on in this case, but that in truth and in fact, that they did give to said defendant such notice and that the same was received and accepted by it and acted upon by it in that, that said defendant did negotiate with plaintiffs as to the settlement of the claim here sued upon, and plaintiffs further say: That if said notice was insufficient for any cause, then that the same has been waived by defendant in that it accepted the written notice tendered, investigated plaintiffs' claim thereunder and after such investigation and while said written notice and claim was still in defendant's possession repudiated it, made offer, of a settlement of said claim which was by the plaintiffs declined.

Plaintiffs deny that they ever withdrew said claim from said defendant, but that said claim was furnished to defendant, acted upon by it and that plaintiffs never received back or took said claim

15 into their possession until after the refusal to settle with plaintiffs upon equitable and just terms.

Plaintiffs further show to the Court that defendant had full and actual notice of the happening of said accident, of the time, place, circumstances and all the facts connected therewith and did fully investigate the same and has not suffered any injury by any failure of plaintiffs to give additional or further notice of their said cause of action.

Plaintiffs specially deny that the provisions to said alleged contract setting up a plea by defendant were valid or binding either under the laws of the State of Missouri or under the laws of the United

States regulating Interstate Commerce, but allege and charge that the same were illegal, null and void.

Plaintiffs further specially deny that the happening of said accident was unavoidable or without negligence but they charge that the same were caused by the negligence of defendant as alleged in their original petition.

Further replying to defendant's said answer, plaintiff- charges that there was no consideration for the execution of the written contract declared on by defendant, and therefore the same is null and void.

Wherefore, plaintiffs pray as in their original petition.

W. M. WILLIAMS,
WOLFE, HARE & MAXEY,
Att'ys for Pl'ff.

Filed Feb. 8, 1909. K. S. Loving, Clerk D. C.

16 *Defendant's Trial Amendment.*

Filed 2, 9, '09.

In the District Court, Grayson County, 15th Judicial District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Comes now the defendant and with leave of the Court files this its trial amendment in answer to plaintiffs' first supplemental petition, and for said amendment says:

That it did have, at the time said shipment was made, two rates applicable to the shipment of said stock; that said two rates were duly and regularly established in accordance with the provisions of the Acts of Congress applicable thereto; that said two rates were provided for by tariff duly filed with and approved by the Interstate Commerce Commission and published by defendant as required by law long prior to said shipment, and that the same were regularly in force at the time thereof and applicable thereto; that in said tariff it is provided that the rate on cattle for a distance of 380 miles, that being the distance from Pilot Grove, Mo. to Guthrie, Okla., shall be 26½ cents per hundred weight on shipments where the carrier's liability is limited, as provided in defendant's live stock contract; in said tariff it is further provided as follows:

"Limitation of Liability. Rates provided on live stock contracts will apply only on shipments made at owner's risk with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract, provided by this Company, the contract to be first duly executed in man-

ner and form provided for therein. One hundred and twenty
17 (120%) per cent of the rates named in this tariff will be charged on shipments made without limitation of carrier's liability at common law, and under this statute, shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein."

Defendant says that said shipment on account of which this suit is brought, was made upon said rate of 26½ cents per hundred weight, said rate being the rate under which defendant's liability should be limited in accordance with its regular form of live stock contracts as provided for in said tariff; that the consideration paid it, as alleged in plaintiffs' petition for the transportation of said cattle was the consideration based upon said 26½ cents cwt. rate.

Defendant says that plaintiffs, had they seen fit to do so, could have made said shipment upon said rate, as provided in said tariff without limitation of liability, in which event they would have had to pay 20% more than they did pay; that said tariff was duly published by defendant and filed and posted at said station of Pilot Grove, and plaintiff- could have ascertained the rates provided for therein, had they seen fit to do so; that they had the choice of making said shipment either with or without defendant's limitation of liability and having accepted the lesser rate and having made said shipment under the rate as provided with limitation of liability and by contract imposing the same as provided by said tariff, they are bound by said contract and by said limitations provided therein.

But defendant further says that whether it be true or not that it had two rates upon said shipment, duly provided by tariff, the
18 rate which was quoted plaintiff- upon said shipment and upon which said shipment was made, was made and quoted with the understanding that defendant's liability would be limited as provided in its current form of live stock contract, and said rate would not have been quoted and said shipment would not have been accepted by it upon said rate except upon limitation of its liability as provided in said form of contract; That had plaintiff desired to ship said cattle without limitation of liability upon defendant's part he could have done so had he seen fit and defendant would have accepted and shipped said cattle upon that basis but the consideration for so doing would have been more than was paid by plaintiff upon said shipment and the rate would have been higher.

Wherefore, defendant prays as originally prayed, that it be discharged with its costs.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Filed Feb. 9, 1909. K. S. Loving, Clerk D. C.

Defendant's First Supplemental Answer.

Filed 2, 9, '09.

In Fifteenth District Court of Grayson County, Texas.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Now comes the defendant and with leave of the Court files this its 1st. Supplemental Answer, and in reply to plaintiffs' 1st. Amended Original Petition filed Feb. 9th 1909, says:

19 First. It demurs thereto because the facts alleged show no cause of action.

HEAD, DILLARD, SMITH & HEAD,
Att'ys for Defendant.

Second. It specially excepts thereto because:

(1) It is too vague and indefinite in stating the contract and its terms under which the cattle were delivered to defendant.

(2) It does not state whether the contract between plaintiffs and defendant was verbal or in writing.

(3) It does not state whether the cattle were delivered to defendant to be carried under its liability as it would exist at common law, or whether they were delivered to be carried under a special contract.

HEAD, DILLARD, SMITH & HEAD,
Att'ys for Defendant.

Third. Defendant denied every allegation in said 1st. Amended Original Petition and demands strict proof thereof.

HEAD, DILLARD, SMITH & HEAD,
Att'ys for Defendant.

Fourth. For special answer to said 1st. Amended Original Petition, defendant re-affirms and adopts all the allegations in its original amended and trial amended answers heretofore filed.

HEAD, DILLARD, SMITH & HEAD.

Filed Feb. 9, 1909. K. S. Loving, Clerk District Court.

Court's Order on Plaintiffs' Special Exception in Their Supplemental Petition.

17838.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

FEB'Y 9TH, 1909.

This day this cause being called, came on to be heard Plaintiffs' special exceptions in their supplemental petition filed herein; and the same having been heard and considered by the court, are sustained as to special exceptions Nos. 6, 7 & 8, and overruled as to all other exceptions.

Court's Order on Defendant's Special Exceptions Contcined in Their *1st Amended Answer.*

17838.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

FEB'Y 9, 1909.

This day this cause being called, came on to be heard the exceptions contained in defendant's first amended answer filed herein; and the same being heard and considered by the Court, is sustained as to said exceptions No. 3, and overruled as to all other of said exceptions and said defendant in open Court excepts to such adverse ruling.

Court's Order on Defendant's Exceptions Contained in Their *Amended Original Answer and 1st Supplemental Answer.*

17838.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

FEB'Y 9", 1909.

This day this cause being called, came on to be heard the exceptions contained in defendant's amended original answer and in its first supplemental answer to plaintiff's first amended original petition:

Said exceptions having been heard and considered by the Court are hereby in all things overruled, to which ruling the said defendant in open Court excepts.

21 *Cost Bond. Approved and Filed* 2, 13, '09.

THE STATE OF TEXAS,
County of Grayson:

Suit Pending in the District Court of Grayson County.

No. —.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Know all men by these presents, That we, Harriman Bros. as Principal and —— —— and —— ——, as sureties, bind ourselves jointly and severally, to pay unto the officers of said Court, all costs that have accrued or may accrue in the prosecution of a suit now pending in said Court, wherein Harriman Bros. is Plaintiff and M., K. & T. Ry. Co. is Defendant.

Witness our hands, this the 13th day of Febr'y, A. D. 1909.

HARRIMAN BROTHERS.
R. L. HARRIMAN.
J. A. L. WOLFE.
WOLFE, HARE & MAXEY.
SILAS HARE.

Approved and filed Feb. 13, 1909. K. S. Loving, Clerk.

Court's Charge.

Filed 2, 13, '09.

In the 15th District Court of Grayson County, Texas, January Term, A. D. 1909.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

GENTLEMEN OF THE JURY: The undisputed evidence in this case shows that on or about the 30th day of January, 1907, Harri-
22 man Brothers, plaintiffs in this case, delivered to defendant the M., K. & T. Ry. Co., at Pilot Grove, in the State of Missouri, thirteen head of cattle to be transported to Enid, Oklahoma; and that while said cattle were en route to their destination and while on defendant's line of railway, the train in which said cattle were being transported was wrecked near the town of Deerfield in said state

of Missouri and all of said cattle were killed; and that there was in said car of cattle at the same time what has been termed a "Herdsman's Outfit" belonging to plaintiffs, which was also lost in said wreck.

Upon the law of this case you are instructed as follows:

1. "Negligence," when used in this charge, means the failure to use such care as a person of ordinary prudence would have used under the same or similar circumstances; or, in other words, negligence means the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances.

2. "Ordinary Care," when used in this charge, means such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

3. When a railway company receives cattle for shipment it is bound to use ordinary care in the management and operation of the train by means of which it transports said cattle and to use such care in providing reasonably safe equipment for such train to the end that said cattle may be carried to their destination in safety, and the failure to use such care in said respect would constitute negligence
23 for which it would be liable in damages to the owners of said cattle if said cattle sustained any injuries or suffered any loss that was proximately caused by such negligence.

4. If you believe from the evidence that defendant's employés in charge of the train that was transporting plaintiffs' cattle were guilty of negligence in respect to the management and operation of said train at the time it was derailed; or if you believe from the evidence that defendant's employés were guilty of negligence in failing to use ordinary care in the inspection of said train and in its equipment and that su- negligence, if any, was the proximate cause of the derailment of said train, then you will find for plaintiffs and assess their damages as hereinafter instructed unless you should find for defendant under other instructions given you.

5. On the other hand, if you do not believe from the evidence that said employés were guilty of negligence in said respect that proximately contributed to the derailment of said train, or if you believe that the derailment of said train was the result of an accident, you will find for defendant.

6. (*a*) The contract of shipment in this case contains among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.

6. (*b*) Said contract also contains a stipulation to the effect that if the cattle in the shipment are lost or killed, that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you.

24 The said contract also contains a stipulation to the effect that if the owners of the cattle shipped by virtue of that contract suffered damages occasioned by the shipment over defendant's line of road, they, the said owners, shall within thirty days give written notice to certain of defendant's agents or employés setting out their claim or demand in writing against the defendant. You are instructed that this stipulation is valid and binding upon the plaintiffs in this suit; and, as to whether or not plaintiffs have complied with this stipulation you are to determine under the succeeding paragraph of this charge.

7. The undisputed evidence on this issue shows that within thirty days after the loss of plaintiffs' cattle in said wreck, one of defendant's agents met plaintiff R. L. Harriman in Bunceton, Missouri, said agent going to said place in response to a letter from said Harriman, requesting a conference *from* defendant in reference to this claim for damages; that at this conference the said Harriman delivered to said agent of defendant such written notice of his claim as was required by said stipulation in the contract; that some days afterwards these same parties had another conference over plaintiffs' claim for damages in the City of Sedalia, Missouri; that at this conference the said R. L. Harriman took from the possession of defendant's said agent the written claim that had heretofore been given to said agent; that said written claim was taken from said agent without his consent and against his will.

Now if you believe from the evidence that the said agent after he received the written claim for damages from plaintiffs took said claim and from the information said claim furnished, made such an investigation of plaintiffs' claim for damages that caused
25 him to seek the interview with the said R. L. Harriman in the City of Sedalia, and that at said interview he announced to the said Harriman his final conclusion in reference to said claim, you are instructed that plaintiff- fully complied with the stipulation in said contract as to the thirty days' notice.

8. On the other hand, if you believe from the evidence that said agent had not made such an investigation as to plaintiffs' claim for damages that he believed was necessary for him to make, and if you further believe from the evidence that said paper was useful for him in making a further investigation in plaintiffs' claim before he could reach a final conclusion in the matter, you will find for defendant on this issue and also find for defendant against plaintiffs' claim for any damages.

9. The burden of proof is on plaintiffs to show by a preponderance of the evidence, by which is meant the greater weight and degree of credible testimony, the facts which will entitle them to recover. You are the exclusive judges of the facts proven, of the credibility of the witnesses and of the weight to be given the testimony, but the law you will receive from the Court and be governed thereby.

10. If you find for plaintiffs, you will find for them in such sum as you believe from the evidence was the fair cash market value of the 13 head of cattle in the City of Enid, Oklahoma, at the time

they would have arrived there had not such train been wrecked together with the cash market value of the said herdsman's outfit.

11. If you find for plaintiffs, the form of your verdict may be, "we, the jury, find for plaintiffs and assess their damages at
26 —, filling the blank with the amount that you find. If you find for defendant you will simply so state. In any event let your verdict be signed by your foreman whom you will select from your number when you retire.

B. L. JONES, *Judge.*

We, the jury find for plaintiffs and assess their damages at $10,640.00.

JNO. M. LOCKE, *Foreman.*

Filed Feb. 13, 1909, K. S. Loving, Clerk District Court.

Judgment.

17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

FEB. 13, 1909.

On this day the above styled and numbered cause coming regularly on for trial, came the plaintiffs in person and by their attorneys and the defendant appeared by attorney and all parties announced ready for trial; a jury having heretofore been demanded, then came a jury of twelve good and lawful men, viz: Jno. M. Locke, and eleven others, who, having been duly selected, empaneled and sworn, and having heard the pleading, evidence, argument of counsel and charge of the Court, retired to consider of their verdict and afterwards returned into open Court, in due form of law, the following verdict, which was received by the Court and is here now entered upon the minutes, to-wit:

"We, the jury find for Plaintiffs and assess their damages at $10,640.00.

JNO. M. LOCKE, *Foreman.*"

27 It is therefore, ordered, adjudged and decreed by the Court that the plaintiffs, R. L. Harriman and Albert Harriman, composing the firm of Harriman Bros., do have and recover of and from the defendant, the Missouri, Kansas & Texas Railway Company, a corporation, the said sum of Ten Thousand, Six Hundred and Forty & no/100 ($10,640.00) Dollars, with interest from this date at the rate of 6% per annum, together with all costs of suit, for which let execution issue.

It is further ordered that the officer- of Court may have their execution against said parties, plaintiff and defendand, for all costs by them in this behalf respectively incurred.

Amended Motion for a New Trial.

Filed ?, 1, '09.

In the District Court of Grayson County, Texas, Fifteenth Judicial District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Now comes the defendant and with leave of the Court amends its original motion for new trial filed Feb. 15th, 1909, and moves the Court to grant it a new trial herein for the following reasons:

First. The Court erred in overruling the second exception in defendant's first amended original answer to plaintiff's first amended original petition, as follows:

"It is too general, vague and indefinite in stating the extent and amount of the damage and injury to plaintiff's cattle and to each head thereof."

Second. The Court erred in overruling the third special exception contained in defendant's first amended original answer to plaintiff's first amended original petition as follows:

28 "Because said petition does not show whether the contract between plaintiff and defendant whereby defendant undertook and promised to transport and deliver said cattle, as alleged, was in writing or was verbal."

Third. The Court erred in overruling the fourth special exception contained in defendant's first amended original answer to plaintiffs' first amended original petition, as follows:

"Said petition does not show whether or not plaintiff relies upon and seeks recovery under, and defendant's liability is regulated by, the Act of Congress of the United States, passed June 29th, 1906, entitled "An Act to Amend an Act entitled, 'An Act to Regulate Commerce, approved February 4th, 1887, and all the acts amendatory thereof and to enlarge the powers of the interstate commerce commission.'"

Fourth. The Court erred in overruling the first special exception in defendant's first supplemental answer to plaintiff's first amended original petition, as follows:

"It is too vague and indefinite in stating the contract and its terms under which the cattle were delivered to defendant."

Fifth. The Court erred in overruling the second special exception in defendant's first supplemental answer to plaintiff's first amended original petition, as follows:

"It does not state whether the contract between plaintiff and defendant was verbal or in writing."

Sixth. The Court erred in overruling the third special exception

in defendant's first supplemental answer to plaintiff's first amended original petition, as follows:

"It does not state whether the cattle were delivered to defendant to be carried under its liability as it would exist at common law or whether they were delivered to be carried under a special contract."

29 Seventh. The Court erred in the following part of section No. 4 of its main charge to the jury:

"Or if you believe from the evidence that defendant's employés were guilty of negligence in failing to use ordinary care in the inspection of said train and in its equipment and that such negligence, if any, was the proximate cause of the derailment of said train, then you will find for plaintiff," because said charge assumes that the defendant's employés did fail to use ordinary care in the inspection of said train and its equipment, and the charge is therefore upon the weight of the evidence.

Eighth. The Court erred in paragraph No. 6-*a* of its main charge to the jury, as follows:

"The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein."

Ninth. The Court erred in paragraph 6-*b* of its main charge to the jury, as follows:

"Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

Tenth. The Court erred in section No. 7 of its main charge to the jury, as follows:

30 "The undisputed evidence on this issue shows that within the thirty days after the loss of plaintiffs' cattle in said wreck, one of defendant's agents met plaintiff R. L. Harriman in Bunceton, Missouri, said agent going to said place in response to a letter from said Harriman requesting a conference from defendant in reference to this claim for damages; that at this conference the said Harriman delivered to said agent of defendant such written notice of his claim as was required by said stipulation in the contract; that some days afterwards these same parties had another conference over plaintiff's claim for damages in the City of Sedalia, Missouri; that at this conference the said R. L. Harriman took from the possession of defendant's said agent the written claim that had heretofore been given to said agent; that said written claim was taken from said agent without his consent and against his will.

Now if you believe from the evidence that the said agent, after he received the written claim for damages from plaintiffs, took said claim and from the information said claim furnished, made such an

investigation of plaintiffs' claim for damages that caused him to seek the interview with the said R. L. Harriman in the City of Sedalia, and that at said interview he announced to the said Harriman his final conclusion in reference to said claim, you are instructed that plaintiff fully complied with the stipulation in said contract as to the thirty days' notice."

Eleventh. The Court erred in Section No. 10 of its main charge to the jury, as follows:

"If you find for plaintiffs you will find for them in such sum as you believe from the evidence was a fair cash market value of the 13 head of cattle, in the City of Enid, Oklahoma, at the time they would have arrived there had not such train been wrecked, together with the cash market value of the said herdsman's outfit."

31 Twelfth. The Court erred in refusing to give to the jury special charge No. 1, requested by defendant, as follows:

"In this case you are instructed to return your verdict in favor of the defendant."

Thirteenth. The Court erred in refusing to give to the jury special charge No. 2, requested by defendant, as follows:

"The contract under which the cattle in question were shipped provides that the defendant shall only be liable for such damages as may result to such live stock from the negligent transportation or handling of the cars, and you are instructed that such stipulation is valid under the laws of Missouri where the contract was made and the wreck occurred, and you will therefore find in favor of the defendant; the evidence not being sufficient to authorize you to find that the wreck was caused by negligence on the part of the defendant within the meaning of said contract."

Fourteenth. The Court erred in refusing to give to the jury special charge No. 3, requested by defendant, as follows:

"In the contract under which the cattle in question were being carried it is provided that as a condition precedent to their right to recover any damages for any loss or injury to said stock, plaintiffs should within thirty days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that no damages can be recovered except those set forth in the required claim, and you are instructed that such provision is valid and binding, both under the laws of Missouri and under the Acts of Congress of the United States, entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce', approved February fourth, eighteen hundred and eighty seven and all acts amendatory thereof, and to enlarge the

32 powers of the Interstate Commerce Commission," approved June 29th, 1906, and an Act entitled "An Act to Regulate Commerce," approved February 4th, 1887, and inasmuch as there is neither allegation nor evidence in this case as to the amount of such claim as filed, you will find in favor of the defendant."

Fifteenth. The Court erred in refusing to give to the jury special charge No. 4, requested by the defendant, as follows:

"In the contract under which the cattle in question were being carried it is provided that no suit should be brought by plaintiffs

against the defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding; and you are instructed that the validity of said provision must be determined by the Act of Congress of the United States entitled, "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eigiteen hundred and eighty seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by an act entitled "An Act to Regulate Commerce," and that under said Acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant."

Sixteenth. The Court erred in refusing to give to the jury special charge No. 6, requested by defendant, as follows:

"In the contract under which the cattle in question were being carried it is provided that in case of any loss or injury to said stock plaintiffs should within thirty days after the happening of the injuries complained of, file with some freight or station agent
33 of the defendant his claim therefor, giving the amount and that their failure to comply with such requirement should absolutely defeat and bar any cause of action for any injuries resulting to said stock, and you are instructed that under the laws of Missouri, where said contract was made and where the wreck occurred, said provision is valid and binding, and if you believe from the evidence that such claim was filed by plaintiffs but subsequently taken from defendant without its consent, and that defendant notified plaintiffs that such taking of such claim would be treated as a withdrawal thereof by them, and notwithstanding such notice, plaintiffs have ever since kept and retained the same, you will find that said provisions of the contract was not complied with by plaintiffs, and you will return your verdict in favor of defendant."

Seventeenth. The Court erred in refusing to give to the jury special charge No. 7, requested by defendant, as follows:

"In the contract under which the cattle in question were being carried, it is stipulated and agreed that each bull did not ex-eed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than such stipulated valuation and you are instructed that the validity of this provision of the contract is governed by the Acts of the Congress of the United States, and especially by the Act entitled "An Act to amend and Act entitled 'An Act to Regulate Commerce', approved February fourth, eighteen hundred and eighty seven and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by the act entitled "An Act to Regulate Commerce", approved February fourth, 1887, and you are further in-
34 structed that under said laws said contract is valid and binding, and in this case you will find for plaintiffs, in arriving at the amount of your verdict you will not allow for any one bull more than $30.00, nor for any one cow more than $20.00.

Eighteenth. The Court erred in refusing to give to the jury special charge No. 8, requested by defendant as follows:

"In the contract under which the cattle in question were being carried it is agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto, plaintiffs should not be entitled to recover more than said amounts, and you are instructed that under the laws of Missouri, where the contract was made and the wreck occurred, such agreement is valid and binding, and in case you find in favor of plaintiffs, in arriving at the amount of your verdict you will not allow for either one of the bulls more than $30.00 nor for either one of the cows more than $20.00."

Nineteenth. The Court erred in refusing to instruct the jury not to consider the remarks made by plaintiff's counsel in his closing argument to the jury, because the same were not supported by the evidence, as shown by defendant's bill of exceptions No. —.

Twentieth. The Court erred in admitting the testimony of the witness —— —— over defendant's objection thereto, as shown by defendant's bill of exceptions No. —.

Twenty-first. The Court erred in admitting the testimony of the witness, —— ——, over defendant's objection thereto, as shown by defendant's bill of exceptions No. —.

35 Twenty-second. The Court erred in admitting the testimony of the witness, —— —— over defendant's objections thereto, as shown by defendant's bill of exceptions No. —.

Twenty-third. The Court erred in admitting the testimony of the witness, —— —— over defendant's objections thereto as shown by defendant's bill of exceptions No. —.

Twenty-fourth. The Court erred in admitting the testimony of the witness, —— ——, over defendant's objections thereto, as shown by defendant's bill of exceptions No. —.

Twenty-fifth. The Court erred in admitting the testimony of the witness, —— ——, over defendant's objections thereto, as shown by defendant's bill of exceptions No. —.

Twenty-sixth. The Court erred in excluding the testimony of the witness —— —— as shown by defendant's bill of exceptions No. —.

Twenty-seventh. The Court erred in excluding the testimony of the witness —— —— as shown by defendant's bill of exceptions No. —.

Twenty-eighth. The Court erred in excluding the testimony of the witness —— ——, as shown by defendant's bill of exceptions No. —.

Twenty-ninth. The statement of plaintiffs' counsel in his closing address to the jury, as shown by defendant's bill of exceptions No. —, were evidential statements made outside of the record in this case and not supported by any evidence before the jury, and the same were highly prejudicial to the defendant.

Thirtieth. The verdict of the jury is unsupported by the evidence in finding that the defendant was guilty of negligence in respect to the management and operation of said train in the wreck of

36 which said cattle were killed at the time the same was derailed.

Thirty-first. The verdict of the jury is unsupported by the evidence in finding that the defendant was guilty of negligence in the inspection of said train and its equipment.

Thirty-second. The verdict of the jury is grossly excessive in amount in that one half thereof would have amply compensated plaintiffs for the value of the property destroyed.

Thirty-third. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in find- that prior to the time plaintiffs took from defendant's claim agent the written claim that they had filed, such claim agent had made such investigation as he believed was necessary for him to make as to the extent of plaintiffs' damage and defendant's liability therefor.

Thirty-fourth. The verdict of the jury is against the great preponderance of the evidence and is without evidence to support it in finding that when plaintiffs took back from defendant's claim agent the written claim which they had filed with defendant, said paper was no longer useful to defendant's claim agent in making a further investigation into plaintiffs' claim.

Thirty-fifth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that there was a market value for plaintiff's cattle at the City of Enid, Oklahoma, at the time they were killed.

Thirty-sixth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that the market value of the plaintiffs thirteen head
37 of cattle and their herdsman's outfit at the time they would have arrived at the City of Enid, Oklahoma, amounted to the sum of $10,640.00.

Thirty-seventh. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that plaintiffs' herdsman's outfit had any cash market value at the City of Enid, Oklahoma, at the time it would have arrived there.

Thirty-eighth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that what is termed plaintiffs' show cattle, viz: the bull, Golden Crown, the heifer, Lavinia, the heifer, Golden Bessie, the heifer Golden Acorn, the heifer Golden Thistle, the bull, Royal Crown, had a cash market value at Enid, Oklahoma.

Thirty-ninth. The verdict of the jury is grossly excessive in amount in that under the allegations of plaintiffs' petition the value of each of the thirteen head of cattle must be taken as the same, no one exceeding one thirteenth part of $15,000.00 and when so considered the highest amount which any of the evidence will authorize cannot exceed $7,000.00.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Filed March 1st, 1909. K. S. Loving, Clerk D. C.

17838.

Court's Order on Defendant's Amended Motion for a New Trial; Notice of Appeal.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

MARCH 22", 1909.

On this day the above entitled and numbered cause being called, came on to be heard the defendant, M. K. & T. Ry. Co.'s
38 amended motion for an order of Court setting aside the judgment heretofore rendered against it and granting it a new trial herein:

Said motion having been heard and considered by the Court is hereby in all things overruled, to which ruling the said defendant excepts and in open Court gives notice of appeal to our Court of Civil Appeals within and for the Fifth Supreme Judicial District of Texas.

It is ordered that twenty days after the adjournment of this term of this Court, be and are hereby allowed the defendant in which to prepare and file its statement of facts and bills of exceptions herein.

Defendant's Requested Charges.

Filed 2, 13, '09.

In District Court of Grayson County, Texas.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

No. 1. In this case you are instructed to return your verdict in favor of the defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Refused.

B. L. JONES, *Judge.*

Filed Feb. 13, 1909. K. S. Loving, Cl'k D. C. By Lucy Fisher, Deputy.

No. 2. The contract under which the cattle in question were shipped provides that the defendant shall only be liable for such damages as may result to such live stock from the negligent transportation or handling of the cars, and you are instructed that such

stipulation is valid under the laws of Missouri where the con-
39 tract was made and the wreck occurred, and you will there-
fore find in favor of the defendant; the evidence not being sufficient to authorize you to find that the wreck was caused by negligence on the part of defendant within the meaning of said contract.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed Feb. 13, 1909. K. S. Loving, Cl'k D. C. Lucy Fisher, Dep.

In District Court Grayson County, Texas.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

No. 3. In the contract under which the cattle in question were being carried it is provided that as a condition precedent to their right to recover any damages for any loss or injury to said stock, plaintiffs should within 30 days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that no damage can be recovered except those set forth in the required claim, and you are instructed that such provision is valid and binding, both under the laws of Missouri and under the Acts of Congress of the United States, entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty seven and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved
40 June 29th, 1906; and an Act entitled "An Act to Regulate Commerce," approved February 4th 1887, and inasmuch as there is neither allegation nor evidence in this case as to the amount of such claim as filed, you will find in favor of the defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

In the District Court of Grayson County, Texas.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

No. 4. In the contract under which the cattle in question were being carried it is provided that no suit should be brought by plain-

tiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding; and you are instructed that the validity of said provision must be determined by the Act of Congress of the United States entitled, "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by an Act entitled "An Act to Regulate Commerce," and that under said Acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you wil- find in favor of the defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

41 Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed Feb. 13, 1909. K. S. Loving, Cl'k D. C. By Lucy Fisher, Deputy.

In the District Court of Grayson County, Texas.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

No. 5. In the contract under which the cattle in question were being carried it is provided that in case of any loss or injury to said stock plaintiffs should within thirty days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that their failure to comply with such requirement should absolutely defeat and bar any cause of action for any injuries resulting to said stock, and you are instructed that the validity of this provision of the contract is governed by the acts of the Congress of the United States, and especially by the Act entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by the Act entitled "An Act to Regulate Commerce, approved February 4th, 1887, and you are further instructed that under said law said contract is valid and binding, and if you believe

42 from the evidence that such claim was filed by plaintiffs but subsequently taken from defendant without its consent, and that defendant notified plaintiffs that such taking of said claim would be treated as a withdrawal thereof by them, and notwithstanding such notice plaintiffs have ever since kept and retained the same, you will find that said provision of the contract was not com-

plied with by plaintiffs, and you will return your verdict in favor of defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed Feb. 13, 1909, K. S. Loving, Clerk D. C. By Lucy Fisher, Deputy.

In the District Court of Grayson County, Texas.

HARRIMAN BROS.
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No. 6. In the contract under which the cattle in question were being carried it is provided that in case of any loss or injury to said stock plaintiffs should within thirty days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that their failure to comply with such requirement should absolutely defeat and bar any cause of action for any injuries resulting to said stock, and you are instructed that under the laws of Missouri, where said contract was made and where the wreck occurred, said provision is valid and binding, and if you believe from the evidence that
43 such claim was filed by plaintiffs but subsequently taken from defendant without its consent and that defendant notified plaintiffs that such taking of said claim would be treated as a withdrawal thereof by them, and notwithstanding such notice plaintiffs have ever since kept and retained the same, you will find that said provision of the contract was not complied with by plaintiffs, and you will return your verdict in favor of defendant.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed Feb. 13, 1909, K. S. Loving, Clerk D. C. By Lucy Fisher, Deputy.

In the District Court of Grayson County, Texas.

HARRIMAN BROS.
vs.
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No. 7. In the contract under which the cattle in question were being carried it is stipulated and agreed that each bull did not exceed

in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any damage or loss thereto plaintiffs should not be entitled to recover more than such stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the Acts of Congress of the United States, and especially by the Act entitled, "An Act to amend an Act entitled
44 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty seven and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by the Act entitled "An Act to Regulate Commerce," approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiffs, in arriving at the amount of your verdict you will not allow for any one bull more than $30.00, nor for any one cow more than $20.00.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Filed Feb. 13, 1909, K. S. Loving, Clerk D. C. By Lucy Fisher, Deputy.

In the District Court of Grayson County, Texas.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

No. 8. In the contract under which the cattle in question were being carried it is agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than said amounts, and you are instructed that under the laws of Missouri, where the contract was made and the wreck occurred, such agreement is valid and binding, and in case you find in favor of plaintiffs, in arriving at the amount of your verdict you will not allow for either one of the bulls more than $30.00 nor for either one of the cows more than $20.00.

HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

45 Requested and refused immediately after the general charge had been read to the jury.

B. L. JONES, *Judge.*

Defendant's Bill of Exception No. 1.

Filed 4, 19, '09.

In the District Court of Grayson County, 15th Judicial District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of the above numbered and entitled cause, after defendant's counsel in making their argument to the jury, had argued to a great extent, as affecting the value of the bull, Golden Crown, the fact that the bull, Choice Goods, which one of the witnesses, Bettridge, had stated to be the greatest bull in the world, had sold for only $5500.00, the plaintiff's counsel in his closing argument stated to the jury that the bull, Choice Goods, at the time of his sale, about which defendant's counsel had argued, was nine years old and argued to the jury that that fact, according to argument of defendant's counsel as to the age of certain of the cows for which plaintiffs were suing, greatly affected his value, and that as a four year old bull he would have sold for more than a nine year old bull.

When plaintiffs' counsel made said statement defendant's counsel objected thereto and insisted that it was not in evidence that said bull, Choice Goods, was nine years old at the time of said sale or as to the effect of his age upon his value; plaintiffs' counsel stated that that was his recollection of the facts in evidence and that the jury had heard the evidence and would judge as to who was right.

46 The Court, by agreement, was not in the Court room during counsel's argument, but upon the closing of counsel's said argument he returned to the Court room and counsel for defendant at once explained to him, in the presence of plaintiffs' counsel and out of the hearing of the jury but in open Court, what had occurred, as above stated to him that they wished to reserve their exceptions to said statement and argument of plaintiffs' counsel as to the age of said bull, and as to the effect thereof upon his value, because there was no evidence, in this case, as to the age of said bull, Choice Goods, or as to the effect age has upon the value of a bull or as to how the value of a bull varies according to age.

The plaintiffs' counsel insisted that the plaintiff R. L. Harriman did testify that said bull, Choice Goods, was nine years old at the time of said sale, and the Court stated that he remembered the evidence as plaintiffs' counsel and did not instruct the jury to disregard said statement and argument of plaintiffs' counsel, and the jury were at no time, and in no way directed not to consider the same, to all of which statements and arguments of plaintiffs' counsel and action of the court, defendant excepted and now tenders this, its

bill of exception No. 1, and asks that the same be allowed, which is accordingly done.

B. L. JONES, *Judge.*

Filed April 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

47 *Defendant's Bill of Exception No. II.*

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

47 HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of Albert Harriman, one of the plaintiffs, and after he had testified that Harriman Bros., had shipped thirteen head of cattle on defendant's road and that twelve were thorough bred short horn cattle and one was a nurse cow and that six of the short horn cattle were show cattle and the rest for sale and had further described five of the show cattle as being his young show herd and had given their pedigrees and as being of a fashionable breed and their market value and had described over defendant's objection as shown in bill of exception No. 1, that among breeders that "show cattle" had such individuality that they could go out in competition and win ribbons, the following question and answer were offered and admitted in evidence by the plaintiff- over the objection of defendant:

Q. How does the value of a show animal compare with another animal of the same age and stock that does not possess the qualities necessary to make him a show animal?

A. Well, it is a great *head* higher.

Defendant's objection to the question and answer was that it was irrelevant and immaterial and an opinion of the witness and too wide a range — to base the opinion. Which objection was by the Court overruled and the defendant then and there in open court excepted and asks that this, its bill of exception No. 2, be allowed and made a part of the record in this case, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

48 *Defendant's Bill of Exception No. III.*

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of one of the plaintiffs, Albert Harriman, and after he had testified that Harriman Bros., shipped thirteen head of cattle on defendant's road and that twelve were thorough-bred short horn cattle and one was a nurse cow and that six of the short horn cattle were show cattle and the rest for sale and had further described five of the show cattle as being of a fashionable breed and had testified as to their market value and had described over defendant's objection as shown in bill of exception No. 1, that "show cattle" has such individuality that they could go out in competition and win ribbons, the following question and answer were offered and admitted in evidence by the plaintiff over the objection of defendant:

Q. Can you state the relative difference in value between the two classes of cattle?

A. That would be pretty hard to say. I expect three times as high—a good herd of show calves.

Defendant's objection to the question and answer was that the same was irrelevant and immaterial and an opinion and conclusion of the witness and too wide a range on which to base the opinion. Which objection was by the Court overruled and the defendant then and there excepted and asks that this, its bill of exception
49 No. 3, be allowed and made a part of the record in this case, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. IV.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence by the plaintiff certain questions and answers in the deposition of one of the plaintiffs, Albert Harriman,

and a witness for himself, and after the witness had testified that five head of the cattle that he had shipped over defendant's road were show cattle and a young herd, and after he had described said five head of show cattle and had given their pedigrees, and had testified as to their value, the following question and answer were offered by the plaintiff and admitted by the Court over the objection of defendant:

Q. Are you able to state what proportion of the cattle bred by short horn breeders make show cattle?

A. It is small.

The objection made by the defendant to the question and answer was, the same was irrelevant and immaterial, too wide a range on which to base an opinion and the attorney for defendant further explained to the Court: "I will state to the Court in this connection that further along you will see that there are shows and shows. They speak of shows in Chicago and State shows, county fair shows, Whitesboro shows, Collinsville shows to illustrate." Whereupon plaintiffs' attorney stated to the Court: "That goes to the weight, we will show what sort of show cattle these were, whether they were Collinsville cattle or Whitewright cattle."

Said objection of defendant was overruled and the evidence permitted to go before the jury. Whereupon defendant then and there excepted in open Court and asks that this its bill of exception No. 4, be allowed and made a part of the record in this cause which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. V.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of one of the plaintiffs, Albert Harriman, and after he had testified that Harriman Bros. shipped thirteen head of cattle over defendant's road and that twelve were thorough bred short horn cattle and one was a nurse cow, and six of the short horn cattle were show cattle, and the rest for sale, and had further described *that* five of the show cattle as being a young show herd and had given their pedigrees as being of a fashionable breed, the following question and answer were offered by the plaintiffs and admitted in evidence by the Court over the objection of defendant:

51 Q. Has the expression show cattle any special meaning among cattle breeders and if so, what?

A. Yes, the show cattle—their individuality is such that they can go out in competition and win ribbons.

Defendant's objection to the question and answer was that the same was irrelevant and immaterial and an opinion and conclusion of the witness and too remote and indefinite. Which objection was by the Court overruled and defendant then and there excepted and asks that this its bill of exception No. 5, be allowed, and made a part of the record in this case, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. VI.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered, that upon the trial of this cause and when certain questions and answers were being offered in evidence in the deposition of Ed Patterson, a witness for plaintiff-, and after the witness had testified that he was a farmer and breeder of and familiar with short horn cattle for a long time and kept posted and had attended shows when cattle were exhibited, etc., the following question and answer were offered in evidence and admitted over the objection of defendant:

52 Q. Has the expression "show cattle" any meaning among short horn men and if so, what?

A. Yes, it has a meaning, I don't hardly know what language to use to define it. If you could take two animals of the same breeding and one of them a show animal an outstanding show animal and the other is very ordinary animal, although they are full sisters or brothers, there is quite a difference in the value of them.

The objection made by the defendant to the question and answer was that the same is an opinion, irrelevant and immaterial, too indefinite, the scope of the ground on which the opinion is admitted is too broad.

The question and answer *was* admitted by the Court, to which ruling of the Court the defendant then and there in open Court excepted and asks that this, its bill of exception No. VI, be allowed and made a part of the record, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. VII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. R*.* Co.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of one Ed Patterson, a witness for the plaintiff,
53 and after the witness had testified that he was a breeder of short horn cattle, was familiar with the value and prices of such cattle and had testified over defendant's objection as shown in bill of exception No. 6 that the expression "show cattle" had a meaning among short horn men, the following question and answer were offered as evidence by the plaintiff and admitted by the Court over the objection of defendant:

Q. How does the value of show cattle compare with the value of other short horn cattle?

A. Well, I don't hardly know how to answer that question. There is such a contrast between the two and such difference in the valuation of a show animal and an ordinary animal, I hardly know how to answer it.

Whereupon there was further offered as evidence and admitted over the objection of defendant the following question and answer:

Q. Which is the greater?

A. The show animal by far.

The objection made by the defendant to the questions and answers was that the same was an opinion, irrelevant and immaterial, too indefinite, the scope of the ground on which the opinion is admitted is too broad. To the ruling of the Court in the admission of the testimony the defendant then and there in open Court excepted, and asks that this its bill of exception No. 7, be allowed and made a part of the record in this case, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

54 *Defendant's Bill of Exception No. VIII.*

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of one Chas. E. Leonard, a witness for the plaintiff, and after the witness had testified that he had been engaged from boyhood in the business of raising and handling short horn cattle and had visited fairs, etc., when cattle were exhibited and was familiar with such cattle, there was offered in evidence and admitted by the Court over the objection of defendant, the following question and answer:

Q. Has the expression "show cattle" any special meaning among cattle men and if so, what is it?

A. Well, there is a great value attached to first class show animals.

The objection made by the defendant to the question and answer was that the same was an opinion and conclusion of the witness, irrelevant and immaterial, and too indefinite.

To which action of the Court in admitting the question and answer, the defendant then and there in open Court excepted and asks that this, its bill of exception No. 8, be allowed and made a part of the record in this case.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

55 *Defendant's Bill of Exception No. IX.*

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

Be it remembered that upon the trial and while there was being read certain questions and answers in the deposition of one Chas. E. Leonard, a witness for the plaintiffs, and after he had testified he had been in the business of raising and breeding stock since his boyhood, and was handling short horn cattle and was familiar with such cattle and had traveled around to shows and fairs where they had been ex-

hibited and had testified over defendant's objection as shown in bill of exception No. 8, that "show cattle" were cattle that were especially cared for for the purpose of exhibitions; that there was great value attached to first class show animals and that they were a better grade and class than the ordinary cattle of the same breed, and had further testified that he didn't think he had ever seen any of the Harriman Bros.' cattle except the bull (Golden Crown) that was three years old, the following question and answer was offered in evidence by the plaintiffs and admitted by the Court over the objection of defendant:

Q. What in your opinion would be the value of a herd of young show cattle in January, 1907, consisting of a bull and four heifers, from one year to eighteen months old; three of the heifers of pure Scotch Breed and all of them pedigreed and in condition for exhibition at the fairs and other cattle shows of the country?

A. Such females I would think would be worth at that time from Five Hundred to One Thousand Dollars.

The objection made to the question and answer by defend-
56 ant was, on the ground that the question as to the value of the herd of young show cattle consisting of a bull and four heifers from one year to eighteen months old, three of the heifers of pure Scotch Breed and all of them pedigreed and in condition for exhibition at the fairs and other cattle shows of the country as too indefinite, on which to base an estimate of the value, it doesn't describe where the show is to be held, or the kind of competition that the herd is capable of meeting, and does not sufficiently give their pedigree; that the hypothetical question is too general, just general term of show cattle, and doesn't give the particular pedigree, but just a pedigreed animal.

To the admission of this question and answer as evidence the defendant then and there excepted in open court and asks that this, its bill of exception No. 9, be allowed and made a part of the record in this case, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. X.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and while there was being read in evidence certain questions and an-
57 swers in a deposition of one Chas. E. Leonard, a witness for the plaintiffs, and after he had testified he had been in the

business of raising and breeding stock since his boyhood, and was handling short horn cattle and was familiar with such cattle and had traveled around to shows and fairs where they had been exhibited and that show cattle were cattle that were especially cared for for the purpose of exhibition and had testified over defendant's objection as shown in bill of exception No. — that they were a better grade and class than the ordinary cattle of the same breed, and had further testified that he didn't think that he had ever seen any of the Harriman Bros. cattle except the bull that was three years old (Golden Crown), the following question and answer was offered in evidence by the plaintiffs and admitted by the Court over the objection of defendant:

Q. I read you the pedigree of Golden Crown, I will get you to state whether that pedigree is a desirable one among short horn breeders and is so regarded?

A. It is a desirable pedigree, and so regarded by breeders. It is also a fashionable pedigree. The Scotch cattle are fashionable cattle to-day. They are the popular cattle to-day.

Q. Are they the high priced cattle.

A. Yes, sir.

The objection made by the defendant to the admission of the questions and answers *were*, that the same were an opinion and conclusion of the witness and hearsay, and on a matter to be decided by the jury, and on the weight of the evidence. To the admission of these questions and answers by the Court as evidence the defendant then and there in open Court excepted and asks that this, its bill of exception No. 10, be allowed and made a part of the record in this cause, which is accordingly done.

58

B. L. JONES, *Judge*.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XI.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and while there was being offered in evidence certain questions and answers in the deposition of one Chas. E. Leonard, a witness for the plaintiff, and after he had testified that he had been in the business of raising and breeding stock since his boyhood, and was handling short horn cattle and was familiar with such cattle and had traveled around to shows and fairs where they had been exhibited and that show cattle

were cattle that were especially cared for for the purpose of exhibition and had testified that they were a better grade and class than the ordinary cattle of the same breed, and had further testified that he knew show cattle, the following question and answer were offered as evidence by the plaintiff and was admitted by the Court over the objection of defendant:

Q. Does the price paid for the bull as a calf determine its value when it is developed and put into a condition to be put into the show yards on exhibition?

59 A. No sir, I don't think it would cut any figure. If he was well bred—you can't sell an animal of the short horn breed to-day unless he is fashionably bred, and that means Scotch bred to-day.

The objection made to the question and answer by defendant was that the same was an opinion and conclusion of the witness on a matter to be decided by the jury and on the weight of the evidence. Which objection was by the court overruled and defendant then and there excepted and asks that this its bill of exception No. 11, be allowed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909, K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of one W. P. Harned, a witness for plaintiffs, and after the witness had testified that he was a farmer and short horn breeder and had been one practically all his life and that he was reasonably familiar with the value and prices of short horn cattle and was in Jan. 1907, and had kept himself posted in regard to prices and that he had seen the herd of short horn cattle belonging to Harri-

60 man Bros., sometime in Jan. 1907, and that he had seen the bull, (Golden Crown) at home and at shows and had examined his pedigree, the following question and answer were offered in evidence by the plaintiffs and were admitted by the Court over the objections of defendant:

Q. What is your opinion of him as a show bull?

A. I think that he was one of the phenominal show bulls of the day.

The objection to the question and answer made by the defendant was that it is the opinion of the witness, irrelevant and immaterial and too remote. Which objection was by the Court overruled and the question and answer admitted in evidence. To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 12, be allowed and made a part of the record in this case, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XIII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and answers in the deposition of one W. P. Harned, a witness for plaintiffs, and after the witness had testified that he was a farmer and short horn
61 breeder and had been one practically all his life and that he was reasonably familiar with the value and price of short horn cattle and was in Jan. 1907, and had kept himself posted in regard to prices and that he had seen the herd of short horn cattle belonging to Harriman Bros., sometime in Jan. 1907, or the day before they were shipped, and that he had seen the bull (Golden Crown) at home and at shows and had examined his pedigree; and had further stated that there is such a variety of estimates placed on bulls that he would hardly know how to estimate the value in this case. That he had gone to the Harriman farm and to the apartment containing show cattle and saw the cattle and had looked at the show herd collectively as they stood and examined them as a show herd with the bull standing at the head of the herd; that he could not take each individual one of *of* them and describe them all as individuals and place an individual price or estimate upon each, the following question and answer were offered in evidence by the plaintiffs and admitted by the Court over the objection of defendant:

Q. Can you state what the average value of the animals composing the herd or the total value of the herd consisting of the bull (Golden Crown) and the four heifers that I have mentioned was in Jan. 1907?

A. Well, the best estimate I would be able to make on these animals as I remember would be $1,000.00 apiece for two and $500.00 apiece for three.

The objection made to the question and answer was that the witness showed that he had not sufficient knowledge on which to base

the estimate he made and he has already testified that he wouldn't make the estimate. To which ruling of the Court in admitting the question and answer, the defendant then and there excepted, and asks
62 that this its bill of exception No. 13 be allowed and made a part of the record in this case.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k, D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XIV.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause when there was being offered certain questions and answers in the deposition of W. P. Harned, a witness for the plaintiff, and after the witness had testified that he had been a breeder of short horn cattle nearly all his life and had seen the Harriman cattle in controversy in this case, the following question and answer were offered in evidence by the plaintiff and admitted by the Court over the objection of the defendant:

Q. Now Mr. Harned, I will get you to describe the characteristics and qualities of these animals as you saw them, composing this herd, as far as you can?

A. Well, a point of special value that would be noted in this bunch of cattle would be their remarkable feed qualities. They were especially well bred Scotch cattle. Their value would consist in their probable ability to enter high class shows and win ribbons and reputation for the owner.

63 The objection made by defendant to the above question and answer was that it is an opinion of the witness, irrelevant and immaterial, too remote and indefinite, notwithstanding such objection the question and answer were admitted by the Court as evidence. To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 14 be allowed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, C'lk D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XV.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered certain questions and answers in the deposition of Wm. A. Betteridge, a witness for plaintiffs, and after the witness had testified that he was a breeder of short horn cattle; had been a breeder of short cattle ever since he had been old enough to be in any business and that he was familiar with the prices of short horn cattle in January, 1907, kept track of the sales and prices they would bring; that he was acquainted with Golden Crown, he was a pure Scotch bull and that he had seen the herd consisting of a bull and four heifers a short time before they were shipped as he understood they were to be shown, the following question and answer were offered in evidence by the plaintiffs and admitted by the Court over defendant's objection:

64 Q. What is the relative value of show cattle as compared with other cattle of the same age, breed, not considered show cattle by short horn men?

A. A show animal that is sufficiently good to go out and win at the big shows is worth all the way from ten to twenty times what it would be worth if not a show animal, if just an ordinary animal. I can cite an instance.

The objection made by the defendant to the admission of this question and answer was that it is an opinion and conclusion of the witness and the witness has already shown that his estimate of what constitutes a show animal is too broad and indefinite to form any basis for him to make an estimate of the value between the value of a show animal and other animals.

To which ruling of the Court in admitting the question and answer defendant then and there excepted and asks that this its bill of exception No. 15, be allowed and made a part of the record, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, C'lk D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XVI.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when there was being offered in evidence certain questions and
65 answers in the deposition of Wm. A. Betteridge, a witness for plaintiff, and after the witness had testified that he was a short horn breeder and familiar with short horn cattle ever since he was old enough to be in any kind of business and had seen the bull (Golden Crown) and that he had seen the show herd consisting of a bull and four heifers before they were shipped as show cattle and that the market value of short horn cattle was not like other there being no fixed value and depending on what price a man wants to pay for a herd of cattle and what price he is willing to pay, the following question and answer were offered in evidence by the plaintiff and admitted by the court over the objection of the defendant:

Q. What valuation did you put upon her (meaning a heifer by choice goods out of Lavender of Tebo Lawn) over a year and under two years old?

A. I think that heifer was well worth one thousand dollars. She was sired by what was conceded to be the greatest bull in the world, and out of a high class cruikshank Lavender cow.

The objection made by the defendant to the admission of the question and answer in evidence was "We object to the last sentence of that answer as an opinion of the witness, irrelevant and immaterial."

To the admission of this question and answer the defendant then and there excepted and asks that this its bill of exception No. 16, be allowed and made a part of the record in this cause.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, C'lk D. C. By W. S. Reeves, Deputy.

66 *Defendant's Bill of Exception No. XVII.*

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when one Thos. Minton, a witness for plaintiffs, was on the stand and after he had testified that he lived at Pilot Grove, Missouri, and had been engaged in the cattle business practically all of his life and in the importation of short horn cattle to this country from England, and that he was now with Harriman Bros. the plaintiff- in this case; was with them in January, 1907; that he knew of the cattle being shipped to Enid, Oklahoma, and had something to do with the preparation of the cattle for sale and that they were in fine condition and that he had started with them to Enid, Oklahoma, the fol-owing question and answer were propounded to the witness by plaintiff:

Q. Some of these cattle were show cattle and some were sale cattle. How many were there of each?

A. There were six of each.

The objection made by defendant was: We object to the term "show cattle" as too indefinite, opinion of the witness and irrelevant and immaterial.

To which ruling of the Court in overruling defendant's objection to said question and answer, the defendant then and there excepted and asks that this its bill of exception No. 17 be allowed and made a part of the record, which is accordingly done.

B. L. JONES,
Judge Presiding.

67 Allowed with the explanation that the term "show cattle" has been explained in the testimony of several witnesses and was shown to have a fixed meaning among cattle men.

B. L. JONES,
Judge 15th District.

Defendant's Bill of Exception No. XVIII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when one Thos. Minton, a witness for plaintiffs, was on the stand and after he

had testified that he lived in Pilot Grove Missouri, and had been engaged in the cattle business practically all of his life and in the importation of short horn cattle to this country from England, and that he was now with Harriman Bros., the plaintiffs in this case; was with them in January, 1907; that he knew of the cattle being shipped to Enid, Oklahoma, and had something to do with the preparation of the cattle for sale and that they were in fine condition and that he started with them to Enid, Oklahoma; and the witness had further testified that there were six show cattle and six sale cattle, over defendant's objection as shown in its bill of exception No. 17, the following question and answer were asked said witness:

Q. What is it that gives to show cattle a peculiar or different calue to ordinary cattle?

68 To which question and answer thereto the defendant objected because the same is irrelevant and immaterial, an opinion of the witness, too remote, that notwithstanding said objections, the witness was permitted to answer, as follows:

A. Well, their perfectness in build and symmetry, their use for improving stock all over the country and for the advertising of our stock, for sale purposes.

To which ruling of the Court the defendant, then and there excepted and asks that this its bill of exception No. 18, be allowed and made a part of the record which is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, C'lk D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XIX.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause when one Thos. Minton was on the witness stand in behalf of plaintiffs and had testified that he had been engaged in breeding and raising fine stock for shows and sales practically all of his life; that he was born in England and had had experience in the importation of short horn cattle to this country from England, but that he was now with Harriman Bros., the plaintiffs, and was with them in January, 1907, and had assisted in preparing these cattle for shipment to Enid, Oklahoma, and had started with them to Enid, and had never seen the cattle since and had testified over defendant's objection

69 that some were show cattle and some were sale cattle and that there were six of each, and that none of the show cattle were for sale and that the bull Golden Crown was not at the head of the young show herd, but was at the head of the herd at home, the following question was propounded to the witness by plaintiffs:

Q. State whether or not this animal, Golden Crown, was a sire of show cattle?

Defendant objected to the question and answer thereto of the witness on the ground that the same is an opinion and conclusion of the witness, too general and indefinite, but notwithstanding such objection, the witness was permitted to answer as follows:

A. He was.

The Court stating that he would overrule the objection by- would require the witness to base his answer on what the progeny of this bull was; not draw from his conclusions. To which ruling of the Court, the defendant again excepted and then the following question was propounded to the witness:

Q. On what do you base the statement that he was a sire of show cattle?

A. Because I showed them and won premiums with them.

To which ruling of the Court in permitting the above answers to be made over defendant's objection, defendant then and there excepted and asks that this its bill of exception No. 19 be allowed and made a part of the record, this is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

70 *Defendant's Bill of Exception No. XX.*

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause and when one Thos. Minton was on the witness stand in behalf of plaintiffs and had testified that he had been engaged in breeding and raising fine stock for shows and sales practically all of his life; that he was born in England and had had experience in the importation of short horn cattle to this country from England, but that he was now with Harriman Bros., the plaintiffs, and was with them in January, 1907, and had assisted in preparing these cattle for shipment to Enid, Oklahoma, and had started with them to Enid, and had never seen the cattle since and had testified over defendant's objection that some were show cattle and some were sale cattle, and that

there were six of each, and that none of the show cattle were for sale and that the bull Golden Crown was not at the head of the young show herd, but was at the head of the herd at home, and after the witness had stated over defendant's objection as shown in his bill of exception No. 19, that the bull, Golden Crown, was a sire of show cattle and that he made that statement because he had showed and won premiums with him, the following question was propounded by plaintiffs to the witness:

Q. How was his get of cattle; how were his show points transmitted in his get; what sort of breeder was he?

To which question and the answer sought to be elicited the defendant objected on the ground that the same is an opinion and conclusion of the witness without a statement of facts, but notwithstanding such objection the court permitted the witness to answer, as follows:

71 A. He was a good breeder.

Thereafter the plaintiff again propounded to said witness the following question:

Q. What did he do with reference to—now you have described his good points which you say made him a show animal. Now how was he as a sire in reference to transmitting the strong points, and again the Court permitted the witness to answer, over defendant's same objection:

A. He transmitted all his good qualities to his calves. Everything almost was transmitted perfect.

To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 20 be allowed and made a part of the record in this case which is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXI.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause and when one J. F. Stodder, a witness for the plaintiffs, was on the stand and had testified that he lived at Burton, Kansas, a and was engaged in the business of breeding short horn cattle and had been for about fifteen years and that he had attended fairs and shows and sales of that kind of cattle and that the Scotch cattle were the most highly
72 prized breed of short horn cattle and that he had some knowledge of the cattle bred by Harriman Bros., and had seen

some of them in 1908, and that he had seen the bull, Golden Crown, at the Oklahoma City State Fair and that in the grand championship show that cattle came in competition with the first prize winners in the different classes and ages, the following question was propounded by plaintiffs to said witness:

Q. Was the bull, Golden Crown, shown in that class for grand championship.

To which question and the answer sought to be elicited the defendant objected on the ground that the same is irrelevant and immaterial, hearsay and an opinion of the witness, but notwithstanding said objection, the witness was permitted to answer:

A. Yes, sir.

And immediately thereafter the plaintiffs propounded the following question:

Q. With what success?

To which question and the answer thereto the defendant again objected on the ground that the same was irrelevant and immaterial, hearsay and an opinion of the witness, but notwithstanding said objection the witness was permitted by the court to answer as follows:

A. He won grand championship at the Oklahoma State Fair.

To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 21 be allowed and made a part of the record which is accordingly done.

B. L. JONES,
Judge Presiding.

73 Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause and when one J. F. Stodder, a witness for plaintiffs, was on the stand and had testified that he lived at Burton, Kansas, and was engaged in the business of breeding short horn cattle and had been for about fifteen years and that he had attended fairs, shows and sales of that kind of cattle and that the Scotch Cattle were the most highly prized breed of short horn cattle and that he had some knowledge of the cattle bred by Harriman Bros., and had seen some of them in 1908, and that he had seen the bull, Golden Crown, at the Oklahoma State Fair and that in the grand championship show cattle came in competition with the first prize winners in the different classes and ages;

it is sort of sweep stakes of all ages and classes put in together and after the witness had further testified over defendant's objection as shown in its bill of exception No. 21, that the bull, Golden Crown, was shown in the grand championship and had won the prize at the Oklahoma State Fair, plaintiffs propounded to the witness the following question:

Q. Was he exhibited in sweelstakes?

A. Yes sir.

74 Immediately thereafter the following question was propounded by plaintiffs to said witness:

Q. With what success?

To which questions and the answers thereto the defendant objected on the ground that the same was irrelevant and immaterial, hearsay and an opinion of the witness, but notwithstanding said objections the Court permitted the witness to answer again as follows:

A. He won.

To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 22 be allowed and made a part of the record in this cause, which is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXIII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause and when one J. F. Stodder, a witness for plaintiff-, was on the stand and had testified that he lived at Burton, Kansas, and was engaged in the business of breeding short horn cattle and had been for about fifteen years, and that he had attended fairs, shows and sales of that kind of cattle and that the Scotch Cattle were the most highly

75 prized breed of short horn cattle and that he had some knowledge of the cattle bred by Harriman Bros., and had seen some of them in 1908, and that he had seen the bull, Golden Crown, at the Oklahoma State Fair, and that in the grand championship show that the cattle came in competition with the first prize winners in the different classes and ages; it is sort of sweepstakes just of ages and classes put in together and after the witness had further testified over defendant's objections as shown in its bill of exception No. 21, that the bull, Golden Crown, was shown in the grand champion-

ship and had won the prize at the Oklahoma State Fair, plaintiff-, propounded to said witness, the following question:

Q. What is the difference in the value of a bull, say two bulls of the same breeding, but one of them has show qualities and the other has not? Is there any difference in the value of such a bull?

A. Yes sir, there is a very great difference in the value.

The plaintiff- then asked the witness the following question:

Q. About what is the difference, could you say?

To which question and the answer sought to be elicited therefrom, the defendant objected on the ground that it is an opinion and conclusion of the witness, too broad a scope and irrelevant and immaterial, but notwithstanding such objection the witness was permitted to answer as follows:

A. There might have been anywhere from $1,000.00 to $6,000.00 or $7,000.00.

To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 23, be allowed and made a part of the record in this cause, which is ac-
76 cordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXIV.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause when R. L. Harriman, one of the plaintiffs, was on the stand in plaintiffs' behalf and had testified that he had been engaged in breeding and handling short horn cattle practically all of his life, and that his connection with this firm and with this herd dates since the spring of 1904, the following question was propounded by plaintiffs to the witness:

Q. What are show cattle, what is it you mean by show cattle?

To which question and the answer thereto the defendant objected on the ground that the same is irrelevant and immaterial, too indefinite and an opinion of the witness, but notwithstanding such objection the witness was permitted to answer:

A. Well, we call show cattle cattle that are high enough class in individuality to contest for prizes in the show ring.

To which ruling of the Court the defendant objected and asks

that this its bill of exception No. 24 be allowed and made a part of the record in this cause which is accordingly done.

77 B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXV.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of this cause and when R. L. Harriman, one of the plaintiffs, was on the stand in plaintiffs' behalf, and had testified that he had been engaged in breeding and handling short horn cattle practically all of his life, and that his connection with this firm and with this herd dates since the spring of 1904, and the witness had further stated over defendant's objection as shown in his bill of exception No. 24 that show cattle are high enough class in individuality to contest for prizes in the show ring, the following question was propounded by plaintiffs to said witness:

Q. Is there any difference in the market value or selling price of cattle which are termed show cattle and other cattle of the same breed?

A. Yes sir.

Immediately thereafter the following question was propounded to the witness:

Q. What is the difference?

To which question and answer thereto the defendant objected on the ground that it was irrelevant, immaterial, too indefinite and an opinion of the witness. Then the following question

78 was propounded by the plaintiff:

Q. I mean is there any difference in price?

A. Yes sir, very wide difference.

Then this question was propounded said witness:

Q. Cattle that are show cattle, what about their price as compared to other stock of the same breed?

To which question, over the objection above set forth made by the defendant, the Court permitted the witness to answer:

A. It varies say from three to eight times as valuable. Average about four times as valuable I would think.

To which ruling of the Court in permitting the witness to answer the above questions, defendant then and there excepted and asks

that this its bill of exception No. 25 be allowed and made a part of the record which is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXVI.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that upon the trial of this cause and when R. L. Harriman, one of the plaintiffs, was on the stand in behalf of plaintiffs and had testified that he had been engaged in breeding and handling short horn cattle practically all his life that
79 his connection with the firm of Harriman Bros. and with this herd of cattle since 1904, and had testified, over defendant's objection as shown in its bill of exception No. 23, that show cattle are cattle high enough classed in individuality to contest for prizes in show rings and that there is a difference in the market value or selling price of cattle, that is, show cattle and other cattle of the same breed, that one thing that gives to them superior value is for their breeding purposes; and that he had bought the bull, Golden Crown, when he was a yearling and that on the 30th day of January, 1907, he was three years old or about three and a half years old; that he knew his pedigree; that he was a wonderful feeder and responded to good treatment and developed beautifully. That the past year he had a show herd, that the herd consisted of four heifers sired by Golden Crown and a young yearling bull that was sired by Orange Viscount owned by Thos. Mitchell and that he was in the habit of attending shows and sales of fine cattle and that he was acquainted with such show cattle and such bulls as Golden Crown, the following question was propounded by plaintiffs to the witness:

Q. How had he proven as a getter of show cattle?

A. He was a wonderful sire; most remarkable sire.

Q. Did that add anything to his value?

A. It certainly would double it.

(The defendant then stated: May it please the Court, we object to his statement that he was a remarkable sire and most remarkable sire as an opinion and conclusion of the witness without stating the facts.)

(The plaintiffs' attorney stated: Then I will ask him to state the

facts.) (The Court stated: I overrule the objection if he will state the facts.)

80 The defendant then and there excepted to the ruling of the Court and plaintiffs then propounded to said witness the following question:

Q. What do you mean by stating that he was a remarkable sire?

To which question and the answer thereto the defendant objected on the ground that the same is an opinion and conclusion of the witness, but notwithstanding such objection the witness was permitted to answer, as follows:

A. It is a matter of record and my opinion that he sired more show cattle in two sea-ons—than any bull we know of in America.

To which ruling of the Court the defendant then and there excepted and asks that this its bill of exception No. 26 be allowed and made a part of the record in this cause, which is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXVII.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while plaintiff R. L. Harriman was on the stand testifying as a witness for plaintiff, and had testified that he had been breeding and handling short horn cattle practi-ally all his life and

81 had explained what was meant by show cattle, and that there was a difference in the market value of show cattle and other cattle of the same breed, and that show cattle were very valuable to a breeder; and had further testified at length concerning the show cattle involved in this suit, and had testified as to their individual pedigree, value, at what fairs they had been exhibited, prizes won by them, and what the show cattle were each worth, and had stated that they had a show herd and had testified as to the individual value and worth of said show herd, that is, each member of it, and the pedigree of each one of them, and had stated that a show herd has a value as a herd; he was asked the following question by his counse-;

Q. Now what I am getting at is this: If you—do they have in those exhibitions at the fair premiums for the herd as well as individuals?

To which question the witness replied that they did, aged herd and young herds.

His counsel then asked witness the following question:

Q. That is what I would like for you to explain; explain to the jury what you mean by the value of the young show herd as a show herd.

To which question the witness replied as follows:

A. It is about the crowning glory of any breeder to bring out a young show herd that can win. It is the greatest attraction to the herd we think we can have. It is about the hardest thing to do to get a young herd that are good enough to win, because there are so many young show cattle. We think they are worth at least a third to half more as a show herd than they would be separated one in one herd and one in another.

82 To the foregoing two questions put to the witness and the answers given by him as above set out, to said two questions, Defendant objected as irrelevant and immaterial and no proper allegation in the pleadings, which objections were by the Court overruled, to which action of the Court defendant then and there excepted, and now tenders this its bill of exce-tion No. 27, and asks that the same be approved, filed and made a part of the record in this cause, which is accordingly done.

B. L. JONES,
Judge Presiding.

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. *D.* By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXIX.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while defendant's witness Samuel Bowser was testifying for defendant by deposition, and had testified that he was in charge of the engine at the time of the accident and very soon after the accident examined thoroughly to see if he could determine the cause of it, and that when the train stopped his engine and ten cars had passed over the bridge and were on the south side of it, and that he found the bridge knocked down and twelve cars inside the creek banks and thirteen cars and the caboose left on the north side

83 of the bridge and coming up to the bridge approach the indications were that a car had derailed and that the trucks slued in towards the center of the track and that when they came in contact wit- the guard rails on the bridge it caused the trucks and car to fall against the bridge and knock it down, he was asked by defendant the following question:

Q. Did any cars go down that went in front of the car that was derailed, according to your judgment, on the south side?

To which question plaintiffs objected as calling for the opinion of the witness and bound to be mere speculation on his part, which objections were by the Court sustained and the witness' answer not permitted in evidence. The answer excluded was as follows:

A. Yes sir, I think there must have been one or two went down in the pit that were on the other side of the car that really done the damage to the bridge.

To the action of the Court in sustaining the objections as aforesaid defendant then and there excepted and here now tenders this its bill of exceptions number 29, and asks that the same be approved, filed and made part of the record in this cause.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

84 *Defendant's Bill of Exception No. XXX.*

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitle- and numbered cause while the witness Samuel Bowser was testifying for defendant by deposition, and had stated that he had ha- many years' experience as a locomotive engineer for the defendant railway and had run for nearly fourteen years as such engineer over the road bed of defendant where the accident in question occurred, and that he was well acquainted with the roadbed of defendant with the bridge in question in this suit, and that both road bed and bridge were first class and in good condition at the time of the accident, and had further testified that his engine at the time of the accident was in perfect condition and that prior to the time of the accident the train had been running easy and smooth, and that he had never had any slow order for the bridge in question or the road along there and that he would have had if they had been in bad condition; that he was in full control when he went on the bridge and noticed nothing wrong until he had passed over it with about ten cars of his train, when he noticed the brakes were set by the air; that they stopped and he got off his engine and went back and saw the bridge was gone and twelve cars in the creek, and had further stated that he at once made a thorough examination of the track, bridge and cars to determine the cause of the accident, and had stated his conclusion as to what caused said accident, and that such a cause was most unusual and he had never known it to happen before, and

that ordinarily the guard rails would prevent this kind of
85 an accident, the witness was asked the following question:

Q. Could it, (the accident have been prevented or guarded against or prevented by any precaution that might have been taken?

To this question plaintiff objected as irrelevant and immaterial and calling for an opinion and conclusion of the witness, and invading the province of the jury, which objection was by the Court sustained. Had the witness been permitted to reply to the question he would have testified as follows:

A. No sir, there could not have been anything done to prevent it.

To the action of the Court in sustaining said objection by plaintiff and refusing to admit the said answer, defendant then and there excepted and here now tenders this its bill of exception No. 30, and a-ks that the same be approved, filed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXXI.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, 15th District.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while defendant's witness was on the stand testifying for defendant, the witness being A. Seddon, and had stated that at
the time of the accident he was road-master of defendant on
86 the division on which the wreck occurred and that he got to the place of the wreck about an hour after it happened, and that he had made a careful inspection of the wreck, and track, the bridge and surrounding circumstances to ascertain the cause of the wreck, and that the bridge was all knocked down, and that it was a one span bridge about two hundred feet long, and that he was familiar with the bridge before the wreck and it was in excellent condition in every respect, and that it was his business as roadmaster to see that the track and bridges were kept in good condition, he was asked the following question by defendant:

Q. What was the condition of the bridge abutments and the bridge itself?

To which the witness replied as follows:

A. So far as I know the bridge was in first class condition. The bridge had nothing to do with the wreck. If it had been ten times stronger it would have gone down under the impact just the same. Of course, I am no bridge man.

To that part of said answer reading, "The bridge had nothing to do with the wreck," plaintiff objected that it was not responsive and the opinion of the witness, and the Court sustained the objection that it was not responsive and excluded that part of the answer. To this action of the Court defendant then and there excepted, and here now tenders this its bill of exceptions number 31, and asks that the same be approved, filed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Dist. C'lk. By W. S. Reeves, Deputy.

87 *Defendant's Bill of Exception No. XXXII.*

Filed 4, 19, '09.

In the District Court for Grayson County, Texas, 15th District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while defendant's witness L. G. Hunter was on the stand testifying in its behalf, and had stated that he was defendant's agent at Pilot Grove, Mo., at the time of the shipment in question and attended to the shipment for the defendant, and that the rate on which the shipment moved to Enid, Oklahoma, was thirty six and one-half cents twenty six and a half to Guthrie, Oklahoma—to which point defendant had its own rails—and ten cents from Guthrie to Enid, and that he got said rate from the general freight agent of his road and did not look it up in the tariff, but relied on the general freight agent's advices, and that the distance from Pilot Grove is three hundred and eighty miles, and having been handed a local distance tariff between Guthrie and Pilot Grove stated that such tariff provided for twenty six and one-half cents, and that that was the rate they used a live stock contract for and he contemplated such a contract when he quoted plaintiffs the rate, the witness was asked the following question by defendant: "Is there any lower rate provided in that tariff on such a shipment?" To which plaintiffs objected that the instrument showed for itself and was the best evidence, and said objection was by the Court sustained and the witness not permitted to answer. Defendant then asked the witness the following question: "Whether or not any rates were provided—well, I will say by the company—on a shipment where the liability of the carrier is not limited?" To which plaintiffs objected that the record showed for itself, which objec-
88 tion was by the Court sustained. Had the witness been permitted to answer the questions he would have replied that

the rate of twenty-six and one-half cents to Guthrie from Pilot Grove was the lowest rate provided by the tariff before him. To the action of the Court in sustaining said objections to the questions aforesaid and excluding said answer, defendant then and there excepted, and here now tenders this its bill of exceptions No. 32, and asks that the same be approved, filed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Approved with the explanation that the tariff sheet about which the witness was being questioned was and had been introduced in evidence and itself showed all rates.

B. L. JONES,
Judge 15th District.

Defendant's Bill of Exception No. XXXIII.

Filed 4, 19, '09.

In the District Court for Grayson County, Texas, 15th District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while defendant's witness L. G. Hunter was on the stand testifying, and on cross examination by plaintiffs had stated that he had been agent of Pilot Grove, about four years and was at the time the twenty six and one-half rate went into effect, and that they had shipped a good many cattle from Pilot Grove since he had been there, and had during each of the four years, he was asked the following question by plaintiffs: "During the whole time you have been there have you ever used any other rate except this
89 cattle rate you have shown here? Have you ever shipped any cattle from Pilot Grove under any rate than this cattle rate shown in the figures just as this twenty six and one-half cents is shown?" To which the witness replied, "No sir," and defendant objected to it as being irrelevant and immaterial, which objection was by the Court overruled. To such action of the Court defendant then and there excepted and here now tenders this its bill of exception number 33 and asks that the same be approved, filed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, C'lk D. C. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXXIV.

Filed 4, 19, '09.

In the District Court for Grayson County, Texas, Fifteenth District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause defendant offered in evidence and read from its cross examination in the deposition of plaintiff A. C. Harrison as follows: that the agent at Pilot Grove knew that they—the plaintiffs, had show cattle to ship and where they were going as he had talked to him about it, but said nothing to the agent about these particular cattle, and that in the contract he made with defendant pertaining to shipment of the cattle in suit, he thought the value placed upon them was as follows: "The four bulls were valued at $30.00 each, and the nine cows at $20.00 each, making a total of $180.00;" and had testified that he signed that contract, but did not tell the agent that the values named were the values of the cattle, and
90 thereupon plaintiff offered in evidence the following questions and answers thereto of the witness:

Q. How did these values happen to be written in the contract?

A. I don't know.

Q. Did the agent inquire of you as to the value of this live stock?

A. No sir.

Q. Did you know that the railroad company charged a higher rate for shipments of high grade and valuable cattle than it does for cattle of ordinary value?

A. No sir.

To the admission of which questions and answers thereto defendant objected as irrelevant and immaterial, which objection was by the Court overruled and the testimony admitted to the jury. The the action of the Court in this regard defendant then and there excepted and now tenders this its bill of exceptions No. 34, and asks that same be approved and filed and made a part of the record in this cause, which is accordingly done.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Clerk District Court. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXXV.

Filed 4, 19, '09.

In the District Court for Grayson County, Texas, Fifteenth District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while defendant's witness Herbert Morris was on the stand testifying and had stated that he was traveling freight claim agent of defendant at the time of the accident in question
91 and had been detailed to investigate the same, and had met plaintiff Harriman on Feb. 24, 1907, and gotten from him a list of the names of the cattle killed in the wreck and their alleged value, having told Harriman that he must have same as a basis for the claim, and had by appointment again met Harriman in March, 1907, at Sedalia, Mo., having telegraphed Harriman to meet him there according to their previous arrangement, and that they met in a room at a hotel and after a little talk Mr. Harriman said he would like to see the papers he had given him (Morris) previously so he could refresh his memory about it, as he didn't remember what it contained, and that he (Morris) thereupon got out the paper and was in the act of showing it to Harriman when he snatched it from his hand and took possession of the paper himself and kept it, and that he thereupon told Harriman that he (Morris), as representative of the defendant, did not further consider that the Harrimans had any claim with the Company as by his act in snatching the paper he had withdrawn the claim, the witness was on cross examination asked the following question: "Q. Was there any proposition made by you there for a settlement of this claim," to which question defendant objected as irrelevant and immaterial and matter of compromise. Plaintiffs' counsel then stated that he offered the testimony on the question of weight and on the question of acting upon the notice that was given, and whether or not the notice that was put in his hands had served the purpose for which the contract claims. The Court thereupon overruled the said objection of defendant to the question quoted, and the witness replied: A. "I don't—well, I think I can answer that question. Let me get that again. You say proposition." Plaintiffs' counsel then asked: Q. "Was there an offer made by you to settle this claim?" to which the witness replied: A. "No,
92 there wasn't an offer. There was a tender made. Mr. Harriman never allowed me to get beyond a tender," to which answer defendant objected as irrelevant and immaterial and matter of compromise, which objection was by the Court overruled.

To the action of the court in overruling its objections to the questions above set out and in permitting the witness to answer as stated, defendant then and there excepted, and here now tenders this its bill of exceptions number 35, and asks that the same be approved, filed and made a part of the record in this cause, which is accordingly done.

The foregoing bill is approved with the explanation that defendant had plead and offered proof to the effect that plaintiffs had withdrawn and recalled the notice and claim of damages and this examination was upon this question and the question of whether or not said notice had served its purpose and whether or not defendant had then repudiated all liability.

B. L. JONES, *Judge.*

Filed Apr. 19, 1909. K. S. Loving, Dist. Clerk. By W. S. Reeves, Deputy.

Defendant's Bill of Exception No. XXXVI.

Filed 4, 19, '09.

In the District Court for Grayson County, Texas, Fifteenth District.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause while plaintiffs' witness, and one of the plaintiffs, R. L. Harriman, was on the stand testifying in his behalf, and had stated that he had given Mr. Herbert Morris a memorandum containing the names, pedigrees and estimated values of their
93 cattle killed in the wreck in question and had done so reluctantly and only because Mr. Morris said the defendant wanted it so as to help them arrive at a fair settlement of the claim, and that this was in February, 1907, and that in March, 1907, he again met Mr. Morris in a hotel in Sedalia, Mo., by appointment, having been told by Mr. Morris at their first meeting in February that he (Morris) would see him again in about ten days with a proposition of settlement, the witness was asked the following question by his counsel: "Q. When you met Morris there—I am not asking you now what proposition was made or anything—was there any attempt, any offer passed from him to you to settle?" to which defendant objected as irrelevant and immaterial and matter of compromise, which said objections were by the Court overruled, plaintiffs' counsel stating that they offered the testimony only on the question of notice. To the question as asked the witness replied: "A. Yes, he brought a witness along and made me a proposition to settle." Whereupon plaintiff asked said witness the further ques-

tion: "Q. Did he state anything to you as to whether or not that was the final proposition or the settlement was off?" To which question defendant objected as irrelevant, immaterial, matter of compromise and the opinion and conclusion of the witness, which objections were by the Court overruled and the witness answered: "He said I could take that or nothing; that I wasn't entitled to anything." To the action of the Court in overruling the objections to the questions and answers, defendant then and there excepted and here tenders this his bill of exceptions No. 36 and asks that the same be approved and filed as a part of the record in the case.

94 The foregoing bill of exception is allowed with this explanation: Defendant had offered the witness Morris and by him proven that the written claim or specification of damage furnished him by the witness had been by the witness withdrawn and by its pleading and evidence sought to defend against plaintiffs' claim by showing the withdrawal of such claim. The evidence objected to was admitted upon the issue as to whether or not defendant had repudiated the claim to such an extent that it was not necessary even for plaintiffs to file the same.

B. L. JONES,
Judge 15th District.

Filed Apr. 19, 1909. K. S. Loving, Dist. Cl'k. By W. S. Reeves, Deputy.

Defendant's Assignments of Error.

Filed 4, 19, '09.

In the District Court of Grayson County, Texas, Fifteenth Judicial District.

No. 17838.

HARRIMAN BROS.
VS.
M., K. & T. RY. CO.

Now comes the defendant and assigns the following as errors committed to its prejudice upon the trial of the above cause:—

First. The Court erred in overruling the second exception contained in defendant's first amended original answer to plaintiffs' first original petition, as follows:

"It is too general, vague and indefinite in stating the extent and amount of the damage and injury to plaintiffs' cattle and to each head thereof."

95 Second. The Court erred in overruling the third special exception contained in defendant's first amended original answer to plaintiffs' first amended original petition, as follows:

"Because said petition does not show whether the contract between plaintiff- and defendant, whereby defendant undertook and promised

to transport and deliver said cattle, as alleged, was in writing or was verbal."

Third. The Court erred in overruling the fourth special exception contained in defendant's first amended original answer to plaintiffs' first amended original petition as follows:

"Said petition does not show whether or not plaintiff- rel*ies* upon and seeks recovery under, and defendant's liability is regulated by, the Act of Congress of the United States, passed June 29th, 1906, entitled 'An Act to Amend an Act entitled, 'An Act to regulate comemrce,' approved February 4th, 1887, and all acts amendatory thereof and to enlarge the powers of the interstate commerce commission.' "

Fourth. The Court erred in overruling the first special exception in defendant's first supplemental answer to plaintiffs' first amended original petition, as follows:

"It is too vague and indefinite in stating the contract and its terms under which the cattle were delivered to defendant."

Fifth. The Court erred in overruling the second special exception in defendant's first supplemental answer to plaintiffs' first amended original petition, as follows:

"It does not state whether the contract between plaintiff- and defendant was verbal or in writing."

Sixth. The Court erred in overruling the third special exception in defendant's first supplemental answer to plaintiffs' first amended original petition, as follows:

96 "It does not state whether the cattle were delivered to defendant to be carried under its liability as it would exist at common law, or whether they were delivered to be carried under a special contract."

Seventh. The Court erred in the following part of section No. 4, of its main charge to the Jury:

"Or if you believe from the evidence that defendant's employés were guilty of negligence in failing to use ordinary care in the inspection of said train and in its equipment and that such negligence if any, was the proximate cause of the derailment of said train, then you will find for plaintiffs," because said charge assumes that the defendant's employés did fail to use ordinary care in the inspection of said train and its equipment, and the charge is therefore upon the weight of the evidence.

Eighth. The Court erred in paragraph No. 6-*a* of its main charge to the jury, as follows:

"The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein."

Ninth. The Court erred in paragraph 6-*b* of its main charge to the jury, as follows:

"Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount it named in said

contract. You are instructed that suc- stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

97 Tenth. The Court erred in section No. 7, of its main charge to the jury, as follows:

"The undisputed evidence on this issue shows that within the thirty days after the loss of plaintiffs' cattle in said wreck, one of defendant's agents met plaintiff R. L. Harriman in Bunceton, Missouri, said agent going to said place in response to a letter from said Harriman requesting a conference *from* defendant in reference to this claim for damages; that at this conference the said Harriman delivered to said agent of defendant such written notice of his claim as was required by said stipulation in the contract; that some days afterwards these same parties had another conference over plaintiffs' claim for damages in the city of Sedalia, Missouri; that at this conference the said R. L. Harriman took from the possession of defendant's said agent the written claim that had heretofore been given to said agent; that said written claim was taken from said agent without his consent and against his will.

Now if you believe from the evidence that the said agent, after he received the written claim for damages from plaintiffs, took said claim and from the information said claim furnished, made such an investigation of plaintiffs' claim for damages that caused him to seek the interview with the said R. L. Harriman in the city of Sedalia, and that at said interview he announced to the said Harriman his final conclusion in reference to said claim, you are instructed that plaintiffs fully complied with the stipulation in said contract as to the thirty days' notice."

98 Eleventh. The Court erred in section No. 10 of its main charge to the jury, as follows:

"If you find for plaintiffs you will find for them in such sum as you believe from the evidence was the fair cash market value of the 13 head of cattle, in the City of Enid, Oklahoma, at the time they would have arrived there had not such train been wrecked, together with the cash market value of the said herdsman's outfit."

Twelfth. The Court erred in refusing to give to the jury special charge No. 1, requested by defendant, as follows:

"In this case you are instructed to return your verdict in favor of the defendant."

Thirteenth. The Court erred in refusing to give to the jury special charge No. 2, requested by defendant, as follows:

"The contract under which the cattle in question were shipped provides that the defendant shall only be liable for such damage as may result to said livestock from the negligent transportation or handling of the cars, and you are instructed that such stipulation is valid under the laws of Missouri where the contract was made and the wreck occurred, and you will therefore find in favor of the defendant; the evidence not being sufficient to authorize you to find that the wreck was caused by negligence on the part of defendant within the meaning of said contract."

Fourteenth. The Court erred in refusing to give to the jury special charge No. 3, requested by the defendant, as follows:

"In the contract under which the cattle in question were being carried it is provided that as a condition precedent to their
99 right to recover any damages for any loss or injury to said stock, plaintiffs should within 30 days after the happening of the injuries complained of, file with some freigh- or station agent of the defendant his claim therefor, giving the amount, and that no damages can be recovered except those set forth in the required claim, and you are instructed that such provision is valid and binding, both under the laws of Missouri and under the Acts of Congress of the United States, entitled 'An Act to Amend an Act entitled 'An Act to Regulate Commerce' approved February fourth eighteen hundred and eighty seven and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906; and an Act entitled "An Act to Regulate Commerce," approved February 4th, 1887, and inasmuch as there is neither allegation nor evidence in this case as to the amount of such claim filed, you will find in favor of the defendant."

Fifteenth. The Court erred in refusing to give to the jury special charge No. 4, requested by the defendant, as follows:

"In the contract under which the cattle in question were being carried it is provided that no suit should be brought by plaintiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding; and you are instructed that the validity of said provision must be determined by the Act of Congress of the United States entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce", approved February fourth eighteen hundred and eighty seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Com-
100 merce Commission," approved June 29th, 1906, and by an Act entitled "An Act to Regulate Commerce," and that under said Acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant.'

Sixteenth. The Court erred in refusing to give to the jury special charge No. 6, requested by the defendant, as follows:

"In the contract under which the cattle in question were being carried it is provided that in case of any loss or injury to said stock plaintiffs should within thirty days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that their failure to comply with such requirement should absolutely defeat and bar any cause of action for any injuries resulting to said stock, and you are instructed that under the laws of Missouri, where said contract was made and where the wreck occurred, said provision is valid and binding, and if you believe from the evidence that such claim was filed by plaintiffs but subsequently taken from defendant without its consent, and that defendant notified plaintiffs that such taking of said claim would be treated as a withdrawal thereof by

them, and notwithstanding such notice plaintiffs have ever since kept and retained the same, you will find that said provision of the contract was not complied with by plaintiffs, and you will return your verdict in favor of defendant."

Eleventh. The Court erred in refusing to give to the jury special charge No. 7, requested by defendant, as follows:

"In the contract under which the cattle in question were being carried it is stipulated and agreed that each bull did not exceed
101 in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than each stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the Acts of the Congress of the United States, and especially by the Act entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce', approved February fourth eighteen hundred and eighty seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by the Act entitled "An Act to Regulate Commerce," approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiffs, in arriving at the amount of your verdict you will not allow for any one bull more than $30.00, nor for any one cow more than $20.00."

Eighteenth. The Court erred in refusing to give to the jury special charge No. 8, requested by the defendant, as follows:

"In the contract under which the cattle in question were being carried it is agreed that each bull did not exceed in value $30.00 and that each cow did not exceed in value $20. and that in case of any loss or damage thereto, plaintiffs should not be entitled to recover more than said amounts, and you are instructed that under the laws of Missouri, where the contract was made and the wreck occurred, such agreement is valid and binding, and in case you find in favor of plaintiffs in arriving at the amount of your verdict, you will not allow for either one of the bulls more than $30.00, nor for either one of the cows more than $20.00."

102 Nineteenth. The Court erred in refusing to instruct the jury not to consider the remarks made by plaintiffs' counsel in his closing argument to the jury, because the same were not supported by the evidence, as shown by defendant's bill of exceptions No. 1.

Twentieth. The Court erred in admitting the testimony of the witness Albert Harriman over defendant's objections thereto, as shown by defendant's bill of exceptions No. 2.

Twenty-first. The Court erred in admitting the testimony of the witness, Albert Harriman, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 3.

Twenty-second. The Court erred in admitting the testimony of the witness Albert Harriman, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 4.

Twenty-third. The Court erred in admitting the testimony of the

witness, Albert Harriman, over defendant's objection, as shown by defendant's bill of exception No. 5.

Twenty-fourth. The Court erred in admitting the testimony of the witness, Ed Patterson, over defendant's objection thereto, as shown by defendant's bill of exceptions No. 6.

Twenty-fifth. The Court erred in admitting the testimony of the witness, Ed Patterson over defendant's objections thereto, as shown by defendant's bill of exceptions No. 7.

Twenty-sixth. The Court erred in admitting the testimony of the witness Chas. E. Leonard, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 8.

103 Twenty-seventh. The Court erred in admitting the testimony of Chas. E. Leonard, over defendant's objections thereto, as shown by its bill of exceptions No. 9.

Twenty-eighth. The Court erred in admitting the testimony of the witness Chas. E. Leonard, as shown by defendant's bill of exceptions No. 10.

Twenty-ninth. The Court erred in admitting the testimony of the witness Chas. E. Leonard, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 11.

Thirtieth. The Court erred in admitting the testimony of the witness, W. P. Harned over defendant's objections thereto, as shown by defendant's bill of exception No. 12.

Thirty-one. The Court erred in admitting the testimony of the witness, W. P. Harned, over defendant's objections thereto as shown by defendant's bill of exception No. 13.

Thirty-second. The Court erred in admitting the testimony of the witness W. P. Harned over defendant's objections thereto, as shown by its bill of exception No. 14.

Thirty-third. The Court erred in admitting the testimony of the witness, William A. Betteridge, over defendant's objections thereto, as shown by its bill of exception No. 15.

Thirty-fourth. The Court erred in admitting the testimony of Wm. A. Betteridge over defendant's objections thereto as shown by its bill of exception No. 16.

Thirty-fifth. The Court erred in admitting the testimony of the witness Thos. Minton over defendant's objections, as shown by its bill of exceptions No. 17.

Thirty-sixth. The Court erred in admitting the testimony of Thos. Minton over defendant's objections thereto, as shown by its bill of exceptions No. 18.

104 Thirty-seventh. The Court erred in admitting the testimony of the witness, Thos. Minton, over defendant's objections thereto, as shown by its bill of exception No. 19.

Thirty-eighth. The Court erred in admitting the testimony of the witness, Thos. Minton, over the objections of defendant, as shown by its bill of exception No. 20.

Thirty-ninth. The Court erred in admitting the testimony of the witness, J. F. Stodder, over defendant's objections thereto, as shown by its bill of exception No. 21.

Fortieth. The Court erred in admitting the testimony of the

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by its bill of exzception No. 22.

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ception No. 23.

Forty-second. The Court erred
B. L. Harriman over defendant's o
bill of exceptions No. 24.

Forty-third. The Court erred i
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shown by its bill of exception No.

Forty-fourth. The Court erred
witness, R. L. Harriman over
shown by its bill of exception No.

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Forty-seventh. The Court erred
witness, Samuel Bowser, as shown
No. 30.

Forty-eighth. The Court erred
witness, A. Seddon, as shown by d

Forty-ninth. The Court erred
witness, L. G. Hunter, as shown
No. 32.

Fiftieth. The Court erred in
witness, L. G. Hunter, as shown
No. 33.

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by its bill of exception No. 34.

Fifty-second. The Court erred
witness, Herbert Morris, over
shown by its bill of exception No

Fifty-third. The Court erred
witness R. L. Harriman, over
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TEXAS RAILWAY CO. VS.

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defendant's objections thereto, as
No. 36.

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Fifty-seventh. The verdict of the jury is against the great preponderance of the evidence and is without evidence to support it in finding that plaintiffs took back from defendant's claim agent the written claim which they had filed with defendant, said paper was no longer useful to defendant's claim agent in making a further investigation into plaintiffs' claim.

Fifty-eighth. The verdict of the jury is against the great preponderance of the evidence and is without evidence to support it in finding that when plaintiffs took back from defendant's claim agent the written claim which they had filed with defendant, said paper was no longer useful to defendant's claim agent in making a further investigation into plaintiffs' claim.

Fifty-ninth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that there was a market value for plaintiffs' cattle at the City of Enid, Oklahoma, at the time they were killed.

Sixtieth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that the market value of plaintiffs' thirteen head of cattle and their herdsman's outfit at the time they would have arrived at the City of Enid, Oklahoma, amounted to the sum of $10,640.00.

107 Sixty-first. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that plaintiff's herdsman's outfit had any cash market value at the City of Enid, Oklahoma, at the time it would have arrived there.

Sixty-second. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding that what is termed plaintiffs' show cattle, viz: The bull, Golden Crown, the heifer, Lavina, the heifer, Golden Beasle, the heifer, Golden Acron, the heifer, Golden Thistle, the bull, Royal Crown, had a cash market value at Enid, Oklahoma.

Sixty-third. The verdict of the jury is grossly excessive in amount in that under the allegations of plaintiffs' petition the value of each of the thirteen head of cattle must be taken as the same, no one exceeding one-thirteenth part of $15,000.00, and when so considered, the highest amount which any of the evidence will authorize cannot exceed $7,000.00.

HEAD, DILLARD, SMITH & HEAD,
Att'y's for Defendant.

Filed Jun- 23, 1909. K. S. Loving, Cl'k D. C. By W. S. Reeves, Deputy.

105 Appeal Bond.

Approved and Filed 4, 8, '09.

Whereas in a certain cause No. 17838, then pending in the District Court of Grayson County, Texas, wherein H. L. Harriman and A. C. Harriman, composing the firm of Harriman Brothers, were plaintiffs and Missouri, Kansas & Texas Railway Company was defendant, the said plaintiffs on the 13th day of February, 1909, recovered a judgment against the said defendant in substance as follows:

For the sum of Ten Thousand Six Hundred and Forty ($10,640.00) Dollars, with interest from date of judgment at the rate of six per cent per annum until paid, together with all costs of suit, for which it is ordered that execution issue.

And, whereas, the said defendant, Missouri, Kansas & Texas Railway Company, desires to appeal from said judgment, and to suspend the execution of same pending such appeal, to do which the giving of a supersedeas bond is required.

Now, therefore, we, Missouri, Kansas & Texas Railway Company as principal, and —— and ——, as sureties, do hereby acknowledge ourselves bound to pay to R. L. Harriman and A. C. Harriman, and each of them, the sum of Twenty-five Thousand ($25,000.00) Dollars, conditioned that such appellant shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

109 Witness our hands this 7th day of April, A. D. 1909.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By HEAD, DILLARD, SMITH & HEAD,
Its Attorneys.

NATIONAL SURETY COMPANY,
By HAYDEN HEAD, *Attorney-in-Fact.*

Approved and filed April 8th, 1909. K. S. Loving, Clerk D. C.

110 *District Clerk's Certificate.*

STATE OF TEXAS,
County of Grayson:

I, K. S. Loving, Clerk of the District Court of Grayson County, Texas, do hereby certify that the above and foregoing 140 pages of typewritten matter is a true and correct copy and constitutes a complete transcript of all proceedings had in Cause No. 17838, Harriman Bros. vs. M. K. & T. Ry. Co. as such matter now appears on file and of record in my office.

Given under my hand and official seal, this the 30th day of June, A. D. 1909.

E. S. LOVING,
Clerk District Court Grayson County, Texas.
By LUCY FISHER, Deputy.

[SEAL.]

111 Tried in the 15th District Court of Grayson County, Texas, January Term, A. D. 1909.

No. 17838.

HARRIMAN BROS.
vs.
M., K. & T. RY. CO.

Statement of Facts.

Counsel present: for Plaintiff, Judge Wolfe, Judge Williams, Mr. Hare; for Defendant, Judge Head, Mr. H. W. Read.

Statement of Facts.

ALBERT C. HARRIMAN testified by Deposition in behalf of plaintiffs as follows:

Answers to direct interrogatories.

By Mr. WILLIAMS:

I am one of the plaintiffs in this case. I live at Pilot Grove, Cooper County, Missouri. My business is shorthorn breeder and farmer. I have been engaged as a shorthorn breeder about ten or twelve years. During that time we have had, I guess, about close to one hundred head—from seventy-five to one hundred head of cattle on the place, sometimes more than that.

My father was at first associated with me in this business and then my uncle, Robert L. Harriman. When my father and I were together, the business of breeding shorthorn cattle was con-
112 ducted under the firm name of W. P. Harriman & Son? The firm name and style at the time R. L. Harriman and I were in business was Harriman Brothers. This was the firm name in 1907. We owned a herd of shorthorn cattle in January, 1907. The owners of these cattle were my uncle, R. L. Harriman, and myself. We were doing business at that time under the name of Harriman Brothers. In January 1907, the cattle were kept on my farm, a mile south of Pilot Grove, Cooper County, Missouri. We shipped some of these cattle on the Missouri, Kansas & Texas Railroad from Pilot Grove to Enid, Oklahoma, on the 30th day of January, 1907. We loaded them about eight o'clock in the morning and I think they left town about six. I left the cattle about three o'clock in the evening to go back to the farm and I understand that they got out of there about between five and six o'clock. I never saw the cattle

afterwards. Our hired man and myself loaded the cattle. I helped. There were thirteen head of cattle shipped at that time. They were in good condition at the time I lift them on the train about three o'clock in the afternoon of January 30th. We tied the cattle in the car and had hay and water in there for them, and a man in the car to take charge of them. Mr. Minton and Walter Connelly were in the car. When we turned them over to the railroad company for shipment, they received them. I suppose they were in good order. They were in good order. We paid the freight on the cattle. These cattle were on the road to Enid, Oklahoma, to a show and sale. They were to be exhibited there at Enid, Oklahoma, in the Oklahoma State Show, I suppose.

The thirteen animals that were included in that shipment were our herd bull, Golden Crown; our young show herd, consisting of a bull and four heifers, and six for the sale, and one nurse cow. The bull Golden Crown was three years old, red, weighed twenty-one hundred pounds, and his pedigree, sired by Golden Fame out
113 of Imported Enchantress by Prince of Fashion. He had been exhibited at some of the shows. We had him at Oklahoma City the year before that. He won in his class and also Senior Champion and Grand Champion. I believe we had not shown him at any other times. His record as a breeder was good. We had had him close to—I guess about twenty months. Yes, I was acquainted with the value of such animals in January 1907, I suppose. It would be pretty hard to say what was the market value of this bull, Golden Crown, in January 1907. The value of a show bull and a breeding bull together is hard to say what they are worth. From three to si- thousand dollars.

The young bull connected with the young show herd, to which I have referred, was a roan, about eighteen months old, weighed about between fourteen and fifteen hundred, sired by Scotland's Crown, out of Roan Osa by Prince Rupert. This was a show bull. We considered him a good show calf. He was out of our young Mary Family that we had produced several show calves from. In my opinion his market value in January 1907 was six or eight hundred dollars. The Mary Family of cattle ranked with the best of our other shorthorn cattle in our herd as producers of show cattle. The name of this young bull was Royal Crown.

There was one of the heifers named Lavinia. She was a red roan, twelve or thirteen months old, sired by Choice Goods and out of Lavender of Tebo Lawn. She was by Collynie, trace to Imported Lavender. We considered her in extra shape, in show condition you might say. Her condition as a show animal was good. In my opinion the market value of the heifer I have described, in January 1907, was from a thousand to twelve hundred dollars.

Another one of the heifers in this young show herd was Golden Bessie. She was a red, ten months old, sired by Golden Crown dam Ortis Bessie, sired by Ravenswood Lavender Viscount
114 traces to Butterfly. This bull Ravenswood Viscount was owned by Mr. Guthrie of Mexico, Missouri. This animal be longed to the Butterfly family. That family of cattle is a fashionable family among breeders of shorthorn cattle. It is a Scotch stock

Scotch Cruikshank stock. In my opinion the market value of this heifer Golden Bessie in January 1907 was about one thousand dollars.

Golden Aron was another one of the heifers in this young herd. She was a red heifer, ten months old, sired by Golden Crown, out of Carnation Charm, by Barmton Bud, traces to Imported Acorn. She belonged to the Scotch Cruikshank family. That is a fashionable and desirable family among cattle breeders. In my opinion the market value of this animal in January 1907 was a thousand dollars.

Golden Thistle was another one of the animals in this show herd. She was a red, twelve months old, sired by Golden Crown, out of Fennel Duchess Thistlewood. She was by Thistlewood. She was a Scotch Topped Princess. That was a fashionable and desirable family among breeders of shorthorn cattle. In my opinion the market value of this animal in January 1907 was seven or eight hundred dollars.

These five head of cattle that I have last described, including the young bull and the four heifers, and composing the young show herd that I have mentioned, were in extra good condition at the time that I last saw them when I put them on the train. I considered them a good show herd.

The expression "Show Cattle" has a special meaning among cattle breeders. The show cattle—their individuality is such that they can go out in competition and win ribbons.

115 The value of a show animal is a great deal higher than the value of another animal of the same age and stock that does not possess the qualities nevessary to make him a show animal. The show cattle are a great deal higher. It would be pretty hard to state the relative difference in value between the two classes of cattle. I expect three times as high, a good show herd of calves. The proportion of the cattle bred by shorthorn breeders that make show cattle is very small. That is as definite as I can make it.

In addition to the six head of show cattle which I have described, there were six head of cattle in the shipment for the sale. They were for sale at Enid, Oklahoma, in Mid Winter. They were about to have a public sale of shorthorn cattle at that place.

Among these six head there was Mt. Vernon Butterfly the second; a roan cow, seven years old, weight fifteen hundred pounds, sired by Red Butterfly. First, dam Princess King coat, sired by Twelfth Duke of Barrington. This animal was an extra good individual. She was in good shape, fat. In my opinion the market value of this animal in January 1907 was three hundred and fifty dollars.

Another one of these six head was Golden Block, bull calf, twelve months old, roan, sired by Golden Crown, first dam Mt. Vernon Butterfly the 2nd. In my opinion the market value of that animal in January 1907 was two hundred and fifty dollars.

In speaking of the market value of these animals, I refer to their market value at the time of the wreck, in January 1907, and I have been referring to that time in all my previous testimony.

The next one was Roan Osa, seven year old roan cow, sired by Prince Rupert, first dam Osa by Victoria Baron.

116 The market value of that animal at the time of the wreck was three hundred dollars. I might state that these cows were bred to Golden Crown. They were in calf at the time of the shipment. That would add something to their value—a third anyhow or a half.

The next one was Scotland's Beauty. She was eight months old, red, sired by Scotland's Crown, first dam Roan Osa by Prince Rupert. In my opinion the market value of that animal at the time stated was two hundred dollars.

The next one was Fennel Duchess Thistlewood. She was a red, seven year old cow, sired by Thistlewood. The value of that cow at the time referred to was three hundred dollars.

There was another named Golden Scotchman. He was a twelve months old red bull, sired by Golden Crown out of Daisy Waterloo, sired by Scotch Minister. The value of that animal at the time stated was two hundred and fifty dollars.

There was a nurse cow. She was a six year old cow, half Jersey. Her market value was sixty dollars.

There was some equipment in the car with the cattle at the time that the shipment was sent from Pilot Grove. We had our herdsman's outfit. That consisted of a big chest, show halters, two sets of blankets and tools and pretty nearly everything that we have to take along to fix up with. This herdsman's outfit was worth about eighty or one hundred dollars. I include in that everything; include the blankets and also outfit for men to sleep on, three or four comforts and beds and buckets and everything.

I think we consigned these cattle to ourselves at Enid, Oklahoma. *There* were never delivered to us. We never received the herdsman's outfit that I mentioned. After the cattle were loaded

117 in the cars at Pilot Grove on the 30th of January, 1907, and I left them that afternoon, I never saw them again. All the cattle but the nurse cow were pedigreed shorthorn animals. Twelve head of them were pedigreed shorthorn animals.

Answers to Cross-interrogatories.

Before the shipment of the cattle from Pilot Grove, I negotiated with the agent there of the defendant for a rate on the cattle to Enid, Oklahoma. We undertook to get as low a rate as possible from Pilot Grove to Enid, Oklahoma, to find out which road to ship on. While negotiating with the agent for a low rate, I couldn't say whether we disclosed to the agent that these were show cattle or not. My uncle attended to that part of it. I didn't apprise him of the great value of these cattle. The agent at home knew what—that we had show cattle and where we were going, and I had talked to him before about it, but I said nothing to him about these particular cattle.

A written claim was presented to the railway company after the wreck, in which I think was made a detailed statement of the loss which we claimed to have sustained on account of the loss of these

cattle. After the wreck, defendant's agent, Morris, did not call upon me to negotiate with me and my uncle with a view of settling the controversy. He did not. I did not see the agent Morris there after the wreck. I met him in Sedalia since the wreck and discussed a settlement of the claim with him. My partner, Mr. Robert L. Harriman, was with me. I couldn't say whether or not I asked Mr. Morris at that time to show me the written claim that we had presented to the railroad company on account of this
118 matter. He had his papers on the desk and the papers were turned over at that place and we took—I don't know whether it was a claim or not. It was the paper that we turned over to him. He had no business with it. It was the paper he got from us. I don't know whether that was the claim that we had presented to the railroad company for damages sustained on account of this wreck or not. My uncle got the paper, but I think it was just a description of the cattle that were killed. No, I don't think it stated the amount of damages we claimed for the cattle, but I wouldn't say. I don't know whether it stated the value of the cattle or not. I don't know whether that is the paper he got or not. He got a paper. I don't know what the paper we got from Morris was and why he had no business with it. As I understood, Uncle Bob asked him for the papers. I don't know why he had no business with it. I couldn't answer that question. I couldn't tell you how it is that my memory now fails me as to the contents of that paper. No sir, I couldn't just now give any reason why he had no business with it. I don't remember about it. Uncle Bob got this paper from the agent at that time. He is my partner and one of the plaintiffs in this suit. I did not see the paper there at that time only I saw him take it and put it in his pocket; saw Uncle Bob take it. It was on the table. I could not say whether Mr. Robert Harriman asked Mr. Morris for the paper or not. I was right there. He went up to the table and took it. I couldn't say whether he asked for it or not. He went up to the table and got the paper and I saw him put it in his pocket. I don't remember hearing him ask Mr. Morris for it. That is the paper I say that Morris, as the agent of the defendant, had no business with. I state that he had no business with it because
Uncle Bob just told me that it was his paper. My Uncle
119 Robert, my partner in this transaction, never did tell me what was in the paper. I couldn't say what was in the paper, but I have an—I think it was just an outline of a description of the cattle. I don't know whethe the value was attached to it or not. I think not though. Morris got this paper from Uncle Bob at Bunceton. I did not understand that it was a paper presented to this agent of the company for the purpose of getting a settlement of this claim. I don't know that that paper was that. I suppose R. L. Harriman, Col. Bob, has that paper now. Yes sir, I suppose. I don't think I read it. I think he told me that it contained a description of the cattle. I don't know that it did, I thought that was what it was. I don't remember whether he told me that it contained a statement of their value also.

I don't think the cow Mt. Vernon Butterfly 2nd. was what is

considered by cattle men as an aged cow. She was a seven year old cow. I have stated that Mt. Vernon Butterfly was seven years old at the time of the accident. We called her seven years old. I don't state of my own knowledge that she was that age at that time. I don't know whether or not it is a fact that she was calved March 20th, 1898. I don't know of my own knowledge. She was a seven year old cow. We had owned this cow four or five years. The value I put on that cow was $350.00 on the basis that she was seven years old. If she was two years older, it might enhance the value a little—decrease I mean—fifty dollars. I arrive at the value of the cow on the basis of breeding qualities and her individuality too. No, I think it is not true that after a cow has become seven years of age they begin to decline. I think they are about at their prime six to eight to nine years old. Whether or not they are just
120 as valuable in every respect at the age of nine or at the age of seven as between the ages of three and seven years of age would depend a great deal on their producing, how they had developed. Without reference to how they developed I suppose that would be less. This cow was a good producer.

Golden Block was another of the sale cattle. Golden Block was less than a year old. He was quite a good individual. He was sired by Golden Crown. I base my estimate on his pedigree and individuality, his appearance, form. It is impossible for me to have told how this bull less than a year old would have developed as a breeder. I can't tell anything about that..

I called the cow Roan Osa a seven year old, but a paper here says she was eight. She was eight years old that spring. The paper I refer to is the American Herd Book. This is a small catalogue. This does not show the age of Mt. Vernon Butterfly. It shows Roan Osa to be eight years old. The American Herd Book shows that Roan Osa was calved April 3rd, 1898. They call them eight years old until after they are nine. I said she was eight years old that spring. That is the previous spring. If she was nearly nine years old, I suppose it would decrease her value some—about twenty-five dollars I think. It couldn't have helped it. It would not decrease her value to the same extent that it did Mt. Vernon Butterfly because she was not quite as high priced a cow. I placed Mt. Vernon Butterfly at $350.00 and this cow at $300.00. There is not much difference in the proportion of decrease I put on them. I stated that both of these cows had been bred, both to Golden Crown. I don't know at what dates they were bred, but they would calf in the spring about February or March. We have it on our
121 books. Both animals were fat. I knew they were in calf from their appearance. I judge from their appearance *and* never been served but one time.

The calf Scotland's Beauty was a heifer. I placed that calf at $200.00. I fix the value of that animal from her pedigree and individuality. Dealers in that class of cattle arrive at the market value by the general price of this class of cattle and the individuality of the pedigrees. I haven't got the American Herd Book to show when this Fennel Duchess cow of Thistlewood, seven years old, was

calved. I could not say whether or not she was calved March 15th, 1898. I don't know when she was calved. I haven't the record with me of the certified pedigree. In my direct examination I gave her age at seven years at the time of the accident. I say that that was her age. I could possibly be mistaken about that as I was in the the case of Roan Osa. If she was calved March 15th, 1898, it might decrease her value a little bit, being a year older. If she was born in April we would not consider her eight years old until April or after April. I suppose her valuation would be decreased by that increased age about like the others.

The calf Golden Scotchman was a bull ten or twelve months old; I don't just remember the months. He was ten or twelve months old I think. He was a calf.

The nurse cow was one we took along to nurse these calves. They were still taking milk from the cow. The values that I put on all these animals that I testified about—I fixed the values of these animals at the place where we expected to sell them. That was at Enid, Oklahoma.

We did not carry any insurance on these cattle that were killed in that wreck. Had no insurance on them.

122 *Answers to Redirect Interrogatories.*

I have been asked about the age of these animals and whether the ages were entered in the Herd Book of short-horn cattle. We had copies of the pedigree of each animal. The pedigrees went down with the wreck. That is the reason I can't give the exact ages here. I thought they were seven years old; may have been eight. There is an original herd book that is kept at Chicago, and we had copies of that, certified pedigrees. These were lost in the wreck. These pedigrees, of course, can be obtained from the Herd Book keeper.

Something was said about the paper that was given to Morris, the agent of the defendant. I did not prepare that. It was prepared by my Uncle Robert. Uncle Robert took it back from Morris. Uncle Robert was representing the frim in attempting to settle with Morris.

(Subscribed and sworn to by Albert C. Harriman on the 30th. day of October, 1908, before John C. Underwood, Notary Public.)

Ed Patterson testified by Deposition for plaintiffs as follows:

Answers to Direct Interrogatories.

I am a farmer and breeder of shorthorn cattle, and manager of Ravenswood Stock Farm. We are breeding shorthorn cattle there. That is our principal business, and I reside in Bunceton, Cooper County, Missouri. I have been engaged in breeding
123 & 124 shorthorn cattle about from seventeen to twenty years, I couldn't tell you, along there somewheres. I have been

general manager of that herd of cattle for that period that I have stated, from seventeen to twenty years, and we probably have on hand 150, probably 100, breeding cows a year. C. E. Leonard and son are the owners of Ravenswood Farm. That is the oldest shorthorn herd west of the Mississippi River. Yes, I have tried to keep myself posted in regard to the prices at which shorthorn cattle had been selling and their values within the last several years. I attend all the principal sales and shows and take all the live stock journals and try to keep posted in that way. I think I am familiar with the prices of shorthorn cattle in 1907.

The expression "show cattle" has a meaning among shorthorn men. I don't hardly know what language to use to define it. If you could take two animals with the same breeding and one of them a show animal, an outstanding show animal, and the other is a very ordinary animal, although they are full sisters and brothers, there is quite a difference in the value of them. It is the formation that makes one a show animal and the other an ordinary animal. One is a perfect animal or nearly so. That is the way we like to breed them. All show animals are perfect. They are called show animals because they are good enough to go out and show, and like begets like, and we like to breed to have the best; and, besides that, there is a little fun in going out and beating the boys and advertising your herd. It is an advertisement to your breed of cattle. If you can go out and demonstrate the fact to the public, it is an inducement to men to visit you and get the seed. I don't hardly know how to answer the question as to how the value of show cattle compares with the value of other shorthorn cattle.

125 There is such a contrast between the two and such difference in the valuation of a show animal and an ordinary animal, I hardly know how to answer it. The show animal is the greater by far.

I guess where I live is about ten miles from the Harriman Bros. farm near Pilot Grove upon which their herd of cattle is kept. The farms are closer, probably six or seven miles. I know the Harriman herd. I have personally inspected the animals in that herd. We visit or exchange visits occasionally. I remember the bull named Golden Crown in the Harriman herd. I have seen his pedigree. I am very familiar with his pedigree. I can state it. He was sired by Imported Golden Fame and out of Imported Enchantress. He was a red bull, probably weighing around a ton when I looked at him last. I think he was a two year old, possibly a little older. I would not say that. I think he was two years old. I saw him last, I guess, a couple of weeks before he was killed in this wreck. I heard of the wreck shortly after it occurred and I saw him about two weeks before that time. He was a very good bull and good bulls are selling from as high as Five and Six Thousand Dollars along there, some for less, but I should think that that bull would be worth $3,000.00 or $3,500.00 in January 1907. I know something about whether this bull had been exhibited at fairs before that time. He had been exhibited. I don't know just how much. I think the boys probably had had him on a tour down through Oklahoma. I

don't know just his wins though; I couldn't state that. I know whether he had been proved to be a good breeder. I knew his get over there. He promised to be a good breeder from the calves he sired. I take all these things into consideration, of course, in fixing his value at $3,000.00 or $3,500. He was a bull that come
126 along well. He was a great eater and as he developed, he filled well, what we call filling well; even flesh. I used the expression about his being a great eater. We mean he was a great eater because he responds to feed and fills well in places where it is very essential that they should fill. For instance, he had a great front flank that all shorthorn men put stress on from the fact that it denominates lung and heart power and constitution. That is one of the weak points with shorthorn cattle that we try to remedy and look to more than most anything else probably. He was well bred; as well bred as any bull; fashionably bred. He was a Scotch bull out of an imported bull and an imported cow and his sire was a bull that had been a producer of good cattle.

I have seen the young show herd consisting of a young bull named Royal Crown, and four young heifers, one called Lavinia, one Golden Bessie, one Golden Acorn and one Golden Thistle. I saw them last I think about two weeks before they were shipped as near as I remember. The cattle in the young show herd were a grand good lot of young cattle. They were good individuals and well fitted for a show when I looked at them last. I had seen them more than once. I have seen them from the time they were calves, off and on. I would think that that young bull would be worth $600.00 in the market in January, 1907. The young heifer Lavinia was a Lavender. I mean she belonged to the Lavender family. I should think that heifer was cheap at $1,000.00. Golden Bessie, by Golden Crown, was a Butterfly. I would put that heifer at—I believe I remember the heifer—I think probably $700.00. The heifer Golden Acorn, by Golden Crown out of Carnation Charm, I would put her at
127 about the same as the Butterfly heifer, $700.00. Golden Thistle, by Golden Crown, out of Fennel Duchess Thistlewood, I would put at $600.00.

I have seen the six head of sale cattle named by the witnesses as Golden Block, Roan Osa, Scotlands Beauty, Fenel Duchess Thistlewood, Golden Scotchman and Mt. Vernon Butterfly four cows and two bulls. I think these animals in January, 1907, would be cheap at $300.00, each of them, the whole collectively; that is to say, each one of the six. They were in the very best of condition, sale condition, at the time I saw them in January. They were so shaped up as to bring the top prices. They were in high flesh and ready for sale.

I don't know really whether I remember the Jersey nurse cow or not. I can answer what a half Jersey nurse cow about six or seven years old would be worth by saying what I have been paying for them. We use a good many nurse cows, and I have been buying them from $50.00 to $75.00.

Answers to Cross-interrogatories.

I don't know anything of the ages of these five so called show cattle. I couldn't tell you their exact ages. I couldn't tell just the age of Golden Acorn. She was around a yearling some place, I would presume. I just couldn't say whether she was a sucking calf or whether they had weaned her. Assuming that she was calved June 9th, 1906, and was killed in this wreck about the last of January, 1907, I still place the valuation of $700.00 on her.

I don't know how long the Harriman Bros. had owned this Golden Crown bull. I couldn't say that. They had owned him probably a year and a half, something like that. I saw him soon after he
128 was brought to that herd. I think he was bought — them in Indiana. I wouldn't be positive of that. I don't know what they paid for him when they bought him. Never heard them say.

I placed a valuation of $300.00 each on the six head of sale cattle, excluding the nurse cow. I mean to fix that valuation on each one collectively. I think they might have brought more and they might not have brought so much, probably if they were put up at public sale.

Q. The valuation is rather in the nature of a guess on your part?

A. Well, it is a guess anyhow, isn't it? The market value on such things is not like the value on beeves.

Take the cow Mt. Vernon Butterfly. I have a strong recollection about that particular cow. She was a grand good individual, a good one, an outstanding good cow. I don't know her age. I think she was seven or eight years old, along there some place. I only know her age by her general appearance.

In reference to these other animals, Golden Block and Roan Osa and Scotland's Be-uty and Fenel Duchess Thistlewood and Golden Scotchman, I recall these animals individually now as to their qualities to a certain extent. I think probably Mt. Vernon Butterfly would have sold for more than $300.00 if she was put up and sold. Golden Block would probably have sold for as much as $300.00. I couldn't say how old that animal was. I couldn't recall. I looked at the sale cattle there collectively. I have no distinct recollection as to the age of Golden Block, whether she was a yearling, two or three years old. Her age would make very little difference in her value from one to three years of age. I just put these collectively. If Golden Block was less than a year old, she probably was worth $250.00.

129 Roan Osa was a mature cow if I remember. I couldn't tell you about how old she was. The Osa family had been good producers. I would rate her higher than the general average that I made there. I would put her at $350.00. I don't recall the description of the cow, nothing specially, only she was a roan. I don't know whether her name would indicate that or not.

I recollect something about the description of Mt. Vernon Butterfly. She was a roan cow if I remember right. I won't be positive, but if I remember, she was a roan.

Q. Then your recollection about these cale cattle is vague and indistinct is it not?

A. For instance we have got a cow there that would——

Q. I am not asking you that?

A. Hold on, wait, she was in the record as a roan and if you look close she was red. If you saw her in the stall——

If she was entered in the herd book as a red, I would say she was red.

I don't remember distinctly anything about Scotland's Beauty in particular. She was not matured to the best of my memory. She was probably a year or past. I think she was red. I would not be positive about that. I think she was red. If she was calved July 15th, 1906, that would make her about six months old at the time of the accident. If she was calved July 15th, 1906, I would value her individually somewhere about $250.00 or $300.00.

I believe I remember Fenel Duchess Thistlewood. I think she was a red. I think she was a yearling. She was probably red with white marks.

Q. Isn't it a fact that she was calved March 15th, 1898?

A. March 15th, 1898.

Q. Yes?

A. Well I may be confused on them. You see it has been quite a while since they were killed.

130 Q. If that is a fact, you have no distinct recollection of this animal now?

A. I have a recollection——

Q. Of these individually?

A. Well probably not.

Q. Therefore it would be impossible for you to say what this animal would be worth because you thought she was a yearling?

A. I was confused on that——

I remember very distinctly the animals when I looked at them last, but I don't remember this animal especially.

Golden Scotchman was a nice bred bull. He was a young bull, probably a yearling. I think that bull was worth something like $600.00. I put the sale cattle there collectively at $300.00. I think probably Golden Scotchman might have sold for $600.00 and he might have cut it half in two. I could come nearer putting a collective estimate on that bunch of sale cattle that they had collectively than individually. I have put an estimate of $600.00 on that eighteen months' old show bull. He might sell at $600.00 and he might sell at $300.00. I say the same of the eighteen months' old show bull that I say of Golden Scotchman that he might have sold at $600.00 or $300.00 if he was put up and sold. That is the way we arrive at the market value of animals, what they sell for when we put them up. No, that same statement does not apply to my estimate of all these show animals. I would say this, that the others are outstanding animals and that would not apply to the others. If they were forced on to the market, then it depends on the fact that you strike a crowd, on the market that you strike and the crowd that you get. There is no fixed value

on any of these animals. It is no
market for beef. I am not speaking
on any of these animals, not even or

131 *Answers to Redirec*

When I say that the animal mig
have stated I believed to be its value
it might command a price of $300.0
my opinion about the market valu
regarded, in my own judgment, as
of the animal.

I was asked in my cross examin
the bull Golden Crown and I state
for a bull when it is an undevelo
as to the market value of that bul
has been developed.

Q. I think in your examination
heifer. I will ask you if Golden Bl
A. Golden Block.
Q. Yes?
A. I got those names confused
ively. I won't say positively, but
it? I won't be positive about that.

When I was stating that value
the average value, taking them a
down the line and look at a bunc
them.

Answers to Recros

The valuation that I have put
market value on these cattle in Ja
sales that I attended around. I
market value of these cattle at Eni

132 *Answers to Redire*

I don't know what the marke
Oklahoma, would be based upon
that character.

(Sworn and subscribed to on the
John S. Underwood, Notary Publ

TEXAS RAILWAY CO. VS.

not like an animal that is sent to
ing of that rule in putting a value
on these sale animals.

ect Interrogatories.

ght have been sold for the price I
ue, or half that price, I mean that
.00 or $600.00 at a sale. In stating
lue of the animal, I gave what I
s the proper and fair market value

ination about the amount paid for
ted I didn't know. The price paid
loped yearling is not any criterion
ull after it is a three year old and

n Golden Block is referred to as a
Block was a heifer or a bull?

d. I remember the herd collect-
t Golden Block was a heifer, wasn't

of these sale cattle, I referred to
as a whole, just as I would walk
uch of stuff and put an average on

ross-interrogatories.

t on these cattle, I consider as the
January 1907, at the sales, different
I don't know anything about the
Enid, Oklahoma, at that time.

irect Interrogatories.

rket value of such cattle at Enid,
on general market value of cattle of

the 30th day of October, 1908, before
ublic.)

CHARLES E. LEONARD testified by deposition for the plaintiffs as follows:

Answers to Direct Interrogatories:

My residence is Bunceton, Cooper County, Missouri, and my occupation is farmer and stock raiser. I have been engaged from my boyhood in the business of raising and breeding stock. I am handling shorthorn cattle. I have been engaged in breeding shorthorn cattle ever since I was a man twenty-one years of age. That was a good while ago. I am sixty-nine and I don't object to my age. I did not keep up to the day the exact time. My father before me was engaged in breeding shorthorn cattle. My father commenced breeding shorthorn cattle in 1839.

We have what they call the American Breeders Association. It is for the publishing and editing of the pedigrees of shorthorn cattle. I was a director in the Association from its organization and was President of the Association three years. I suppose since 1867 I might say that I have had from one to two hundred head of
133 shorthorn cattle on the farm. I have been in the habit of attending sales in the various parts of the country of shorthorn cattle. I have been in Ohio and Chicago, Wisconsin, Iowa and Missouri. I have attended a great many sales elsewhere down in Texas. I don't believe I was ever in Oklahoma or Indian Territory. I have acted as judge in shows and exhibitions of shorthorn cattle. At the old St. Louis Fair, I was judge there a number of years, and at Chicago, Minneapolis, Minnesota, Kansas City, Fort Worth, Texas. I may have visited others but I don't call them to mind just now. I have attended a number of sales and with interest look over the published accounts of sales that I have not attended. As a breeder and dealer in such cattle, I have kept up with the prices of such stock I guess about as well as one could do.

There is great value attached to first class show animals. By show animals we mean animals that are sufficiently good to go in the ring and carry off the prizes where there is considerable competition. It is their ability, as I said, to win prizes, and upon the principal that like begets like that gives show cattle special value over other cattle of the same breed. We think first class show cattle are more likely to produce show cattle than those that are not. Show cattle are of better grade and class than the ordinary cattle of the same breed. If they were not better than the others—they are better grade in this respect, that they have been better cared for; they are no better bred, but better cared for. I don't think I ever saw but one of the cattle of Harriman Bros. that were killed in the wreck in January 1907. That was—understand, I don't know that the bull was killed—that was this three year old bull. I saw him when he was probably about two years old.

134 Q. What, in your opinion, would be the value of a herd of young show cattle, in January 1907, consisting of a bull and four heifers from one year to eighteen months old, three of the heifers of pure Scotch breed and all of them pedigreed, and in a

condition for exhibition at the fairs and other cattle shows of the country?

A. Such females, I would think, would be worth at that time from $500.00 to $1,000.00.

Q. Can you state, the, generally the value of sales cattle of the shorthorn breed of the character that I have mentioned, which are well bred, pedigreed cattle and in good saleable condition and order?

A. I would say from two to five hundred dollars.

Answers to Cross-interrogatories.

Not offered.

Answers to Redirect Interrogatories.

Q. I will read you the pedigrees of Golden Crown. I will get you to state whether that pedigree is a desirbale one among shorthorn breeders, and is so regarded?

A. It is a desirable pedigree and so regarded by breeders. It is also a fashionable pedigree. The Scotch cattle are fashionable cattle today. They are the popular cattle today. They are high priced cattle.

The price paid for the bull as a calf does not determine its value when it is developed and put into a condition to be put into the show yards on exhibition. I don't think it would cut any figure. If he was well bred—you can't sell an animal of the shorthorn breed today unless he is fashionably bred, and that means Scotch bred today.

186 Q. In what does the value of the bull consist—in what does the value of a well bred bull consist?

A. To reproduce himself. Not always well bred, but well bred and meritorious is more likely to reproduce himself than one that is not so meritorious.

The fact that he has developed thoroughly and is breeding satisfactorily constitutes the difference between the value of the bull when a calf and his value when he is a three year old and had developed and has been tried as a breeder. In other words, the animal before it is tried and proved itself to breed satisfactorily might be worth very little, and after it has proved itself to be a good breeder and show bull, it would be very valuable, much more than he was before these facts have been demonstrated or proven.

(Subscribed and sworn to on the 30th day of October, 1908 before John S. Underwood, Notary Public.)

WILLIAM P. HARNED testified by deposition for the plaintiffs as follows:

Answers to Direct Interrogatories.

My postoffice is Vermont, Missouri, and I am a farmer and shorthorn breeder. I have been engaged as a shorthorn breeder virtually all my life. My father commenced when I was eight or nine years

old and I have been in the business ever since. My herd is now 120 head of registered cattle. It runs generally from 100 to 200. It is not quite as large now as it has been. I am three miles from Bunceton and I think Harriman Bros. are about nine miles from Bunceton, making about twelve miles from my farm to theirs.

Yes, I think I am reasonably familiar with the value and prices of shorthorn cattle and was in January 1907. I read a good deal on that subject and am interested in it and that is my business, my exclusive business. I have kept myself posted in regard to the prices brought at the sales of these cattle at Kansas City and Chicago and other places where such cattle sales have been made. When I do not attend in person, I get the reports of the live stock journals.

I have seen the herd of shorthorn cattle belonging to Harriman Bros. I have visited them a number of times. They have been quite extensive buyers of high class cattle, and being interested in the business, I have visited them to examine the herd of cattle and those that were purchased. I know I saw the cattle about January 1907, but to the day I couldn't swear positively. I couldn't swear that it was January, but I can swear that I was at the farm the day before they were shipped. I remember quite well of hearing of the wreck of the Harriman cattle. I was at the Harriman farm one day and the cattle were shipped the next, and I heard of the wreck the next morning early.

I have seen the bull Golden Crown. I am familiar with the bull. I couldn't state how often I had seen him; quite a number of times. I saw him at shows and examined him, and he was a bull that had become somewhat talked of in our neighborhood, and as a matter of information in the study of shorthorn cattle I had taken some pains to examine this bull. I had examined his pedigree. I remember the bull was sired by Imported Golden Fame, a bull owned by Mr. Donahew of Iowa. He was one of Imported Enchantress, by Prince of Fashion. These bulls have Herd Book numbers, but I can't carry them in my mind. I think he was one of the phenomenal show bulls of the day. The point of special value, as I considered it, in this bull was his remarkable covering of flesh, evenness and show character. By 'Show character' we simply mean individuality or shows that he is somebody or thoroughbred. That is, I mean he was a very high class specimen of the shorthorn breed. My opinion was that he was one of the most aristocratic appearing shorthorn bulls I had seen in late years.

Q. What was the fair market value of this bull in January 1907?

A. Well, do you want me to give——

Q. I want your opinion about what he ought to have brought on the market, should have brought on the market?

A. You want me to give my opinion of what he was worth to the public or what he was worth to the owners.

Q. My question is what in your opinion was the fair market value, that is, what the bull would have sold for if there had been a purchaser ready and willing to buy him and the plaintiffs had been ready and willing to sell him?

A. There is such a variety of estimates placed on bulls, I am afraid I hardly know how to estimate it in this case. Of course, we estimate the value of a thing as the highest price it will bring. The high market for a bull of that kind is a man that is fixing up a herd. That is the market. We have buyers for these bulls to show, buyers every year.

When I went to the farm, I went to the apartments containing the show cattle and I looked at the show herd collectively, as they stood, and examined them as a show herd with the bull standing at the head of the herd. For me to take each individual, Lavinia, or Golden Bessie, or Golden Acorn and describe them all as individuals and place an individual price or estimate on each, I can't do that at this date. The best estimate I would be able to make on the value of the animals composing the herd consisting of the bull and four heifers as I remember, in January 1907, would be $1,000.00 a piece for two, and $500.00 a piece for three. I remember the heifer that I place the $1,000.00 value on. I can't swear it is Lavinia, but I think it is. She was by Choice Goods. Now to designate the other $1,000.00 heifer, I remember the estimate I placed on the heifer and I have a distinct recollection in my mind of the heifers as they stood before me, but I don't know which is the $1,000.00 heifer. A point of special value that would be noted in this bunch of cattle would be their remarkable feeding qualities. They were especially well bred Scotch cattle. Their value would consist in their probably ability to enter high class shows and win ribbons and reputation for the owner.

138

I don't think I have a definite recollection of the sale cattle—or rather I say I remember them only as a bunch I don't know what name now belongs to the different animals. I think we were all together when I saw the sale cattle. I went over to the place with Mr. Robert Harriman. Mr. Bert Harriman was at home and the herdsman led out the cattle. It has been more than a year ago, but I am very certain Mr. R. L. Harriman was with me when I saw the cattle. I looked over the sale cattle at that time. I examined them. That was the day before their shipment; two days before I heard of the wreck. The cattle were in fine trim for sale cattle, almost in show condition. Some of them might be worth more and some less, but I think I have rather a good idea about how to estimate them in my mind, and I would have to put them at an average of $225.00.

139

I don't remember anything about the Jersey nurse cow. I could only tell about what a person would have to pay for a nurse cow. Half Jersey nurse cows usually sell from $40.00 to $60.00. I don't remember the cow well enough to put an estimate on her.

(Subscribed and sworn to on the 30th day of October, 1908, before John S. Underwood, Notary Public.)

WILLIAM A. BETTERIDGE testified by deposition for the plaintiffs as follows:

Answers to Direct Interrogatories.

I live about two miles and a half southeast of Pleasant Green. I am a breeder of shorthorn cattle and farmer. Ever since I have been old enough to be engaged in anything I have been connected with shorthorn cattle, about thirty-eight years; and have been a breeder of the same since 1888. I was as familiar with the prices of shorthorn cattle in January 1907 as any breeder could be. I kept track of the sales and the prices they were bringing. I took the catalogues and kept posted as to the prices realized at the sales.

I knew the bull Golden Crown belonging to plaintiffs. I had seen him a number of times. I can't say how often, probably fifteen or twenty times altogether. He was a pure Scotch bull, sired by Imported Golden Fame, out of Imported Enchantress, by Prince of Fashion. Golden Fame was one of the most noted bulls of his
140 day this side of the water and headed the herd of W. D. Flatt, of Ontario, who has made the highest sale of shorthorns that has been made in the United States in the last twenty years. Golden Fame was heading his herd at that time. I haven't Golden Crown's exact age. He was about a three year old bull in January 1907. He was in fine show fix. The market value of shorthorns isn't like any other on fat cattle. There is no fixed value. It depends on the price a man wants to pay for a herd of cattle, what price he is willing to pay for him.

I have seen all the show herd, consisting of a bull and four heifers, a short time before they were shipped, the cattle they told me they were going to ship to the show. As near as I can remember, I saw them last about two weeks prior to the time I heard of the wreck. I drove through there and the herdsman showed me the cattle. They were a lot of good cattle and in show fix. The question as to how they compared with other show cattle is a question that is hard to answer because there are other show cattle—there are show cattle and show cattle, and I will have to have some show cattle to compare them with. We shorthorn breeders consider anything that is fitted and stands a probability of winning premiums in shows as show animals. We may be mistaken and are very often as to its ability to win. Judging on that basis, I considered the five cattle a show herd with a good probability of winning. The herdsman, Thomas Minton, showed me those cattle the last time I saw them. I saw them more than once. I have seen them several times, but only once just before they shipped them. A show animal that is sufficiently good to go out and win at the big shows is worth all the way from ten to twenty times what it would be worth if not a show animal, if just an ordi-
141 nary animal. I can cite an instance. If I had a list of the animals composing the show herd and their pedigrees, I could put a better average estimate on their value in January 1907. I would put a collective estimate on the whole herd of show cattle, the four heifers and the bull, of about $600.00. I mean that as the average of each of the five, provided, of course, a buyer wanted to

buy them as show cattle. He would be willing to pay that, an ordinary buyer, and that is what they would have to be sold to.

I remember seeing six head of sale cattle, consisting of two bulls and three cows and a heifer. I have seen them all. I couldn't identify all those sale cattle. I wasn't as much interested in them as the show cattle. I remember seeing them. I remember one especially, the Butterfly cow. She was a great big roan cow and an ornament to any man's herd. From my knowledge of these sales cattle, I believe in any shorthorn sale they would have brought from $1,500.00 to $1,800.00, as near as I can estimate, the six head.

A good ordinary Jersey cow sells around $50.00.

Answers to Cross-Interrogatories.

I remember the cow called Mt. Vernon Butterfly. I remember her distinctly. She was a roan cow. If she was entered in the herd book as a red cow, I am not mistaken as to the color of the cow. If she was entered in the herd book as a red cow, she was either entered by mistake or the cow changed her color, as they sometimes do. Frequently colid red calves get to be red roan as they grow older.

142 I heard part of Mr. A. C. Harriman's testimony here in this case today. I didn't hear him testify that this Mt. Vernon Butterfly was a red cow. I don't remember it. I didn't pay any attention to that.

In my direct examination when Judge Williams asked me what was my opinion of the value of this so called herd of show cattle, a bull and four heifers, I answered that if I had the pedigrees of the cattle before me I could give a more intelligent answer. Then without calling for the description and without having the description, I gave an answer as to the value. I know practically what family all the cattle belong to and what they are sired by. There was a herd bull. I don't know his name. I can give his pedigree. I suppose he was entered in the herd book. I never had occasion to look him up. I don't know the exact age of the roan bull at the time of his death. He was a young bull under two years old. As I remember, he was sired by Scotland's Crown out of Roan Osa by First Rupert. I can put an approximate value on him. All values are approximate on shorthorn cattle. If I wanted a show bull like him—I saw them as a young herd and made an estimate on the whole herd. This individual animal would probably be worth somewhere around $400.00 with his show prospects. There was a heifer by Choice Goods, out of Lavender of Tebo Lawn, a roan heifer. She was around a yearling. She was under two. I think that heifer was well worth $1,000.00. She was sired by what was conceded to be the greatest bull in the world, and out of a high class Cruikshank Lavender cow. There was another Scotch heifer in the herd, I remember, sired by Golden Crown, out of Ortiz Bessie, as near as I remember. Ortiz Bessis was sired by Ravenswood

143 Lavender Viscount. I don't rem-ber her age exactly. She was around a yearling or something. With her prospects as a show animal, that heifer ought to be worth $600.00. That is three. I can remember the other two. There was another Scotch

heifer sired by Golden Crown, out of a Cruikshank Acorn cow, a red heifer as I remember it. It was out of a Cruikshank cow of the Acorn family. I don't remember the cow's name. That animal ought to be worth $500.00. The other was a cow, a Scotch topped heifer, as I remember it, by Golden Crown. I don't remember the name of her dam. Included in the show herd, I think she was worth $400.00, around there.

Q. And the bull Golden Crown, you place an estimate of from $2,000.00 to $5,000.00 on him?

A. Just depends. The selling value of a bull depends on finding a buyer for the bull.

(Subscribed and sworn to on the 30th day of October, 1908, before John S. Underwood, Jr., Notary Public.)

THOMAS MINTON, being duly sworn and introduced as a witness for the plaintiffs, testified as follows:

Direct examination by Judge WOLFE:

My name is Thomas Minton. I live at Pilot Grove, Missouri. I am engaged in the breeding and fitting of fine stock for shows and sales. I have been engaged in this business all my life. I was born in England. I have had experience in the importation of
144 shorthorn cattle to this country from England. I have crossed the Atlantic with steers and brought back pure shorthorns twenty-three times. This has been my life business. I am now with Harriman Bros. In January 1907 I was with them. In January 1907 I know of them shipping some show cattle and sales cattle to Enid, Oklahoma. I had something to do with the preparation of those cattle for sale and for show. I prepared them. Those cattle were in as fine condition as it was possible to have them. They were loaded on the cars at Pilot Grove. I went with them myself. I did not go to Enid. I got a few miles past Nevada, Missouri, and something happened there. They were thrown into the creek. I was in the caboose at the time this thing happened. I was asleep. It was in the day time about one o'clock. The first thing that attracted my attention with reference to anything going wrong was I was thrown to the front end of the caboose, and I got up and saw a flagman take a flag and run up to flag the passenger that was due to follow. I got out of the caboose then as quickly as I could. I went down to the place of the accident as fast as I could, to the place where they fell in the creek. There was a creek there and a bridge over the creek. The bridge was off its basement, off its foundation and down in the creek. The cars of my train were down in the creek. All of them were not down in the creek. Part of them were on the north side and part on the south. I was on the north side. I was going south. I can't exactly tell how many cars went into the creek, but I believe it was thirteen. I didn't see my cattle. I couldn't see them. I found part of the car. I could see a little part of the car, but I couldn't find the cattle. I investigated as far as I could to see if the cattle were dead or alive. I got down and

listened to see if I could hear a sound, but there was not a
145 sound whatever. The company never delivered those cattle to me or to Harriman Bros. I have never seen the cattle since. Some of those cattle were show cattle and some were sale cattle. There were six of each. There were thirteen in the car. The thirteenth animal was a nurse cow. By 'nurse cow' I mean a cow that was giving milk and which was the nurse of one of the calves that we had in the car. By show cattle I mean cattle that are fitted to go to a place where they are advertised for show and to be put before the judges to know if they are good enough to win premiums. They have an annual sale there for selling cattle to the breeders around that district. Six of those cattle were to be offered for sale and six of them were for show for what premiums and advertisements we could get. None of those show cattle were for sale at all. There is a peculiar or extra value attached to show cattle. The things that give to show cattle a peculiar or different value to ordinary cattle are their perfectness in build and symmetry, their use for improving stock all over the country and for the advertising of our stock for sale purposes. In selecting an animal to go into the show herd, he must be a perfect animal in every shape and form; must be an animal that must go out and stand out in the ring with eighteen or twenty and sometimes more than that and take his place as a splendid individual. There are different points in cattle of course that a judge looks to in judging cattle. We have the Scotch cattle that we are breeding, the low down blocky kind, short legs. They are broad, large broad backs and very wide on top of the shoulders and fine head; what we call fine heads on them and wide in the face; everything that makes you think they are good. An amateur would say they were good; broad chests, good legs, broad
146 back. They must be perfect in every respect to get premiums. They weight a good deal more than ordinary cattle because they are continually fitted. To fit a show herd for a show, there is a great deal of labor and expense attached to that. It depends upon the age as to what it would be worth to fit an animal for the show ring. To fit such cattle as we had in that herd it would cost twelve to fifteen dollars a month for eight months and then it would cost more afterwards. Those show cattle that we had ranged from fifteen months to eleven months old. The oldest one was about fifteen months old. I think there were two of them eleven months old. I am not exactly sure. Those were heifers. Those calves that were eleven months old would have weighed one thousand pounds at the time of their death. Those were all pedigreed cattle. We have a shorthorn Herd Book, shorthorn herd society, and no man can show or raise those cattle unless he has a pedigree. These pedigrees are sent in when the calf is born and registered and unless they are registered, you can't show them. This pedigree shows the mother and sire and date of birth and the owner, who owned him at the time; who bred them.

The bull Golden Crown was not at the head of the young show herd. He was at the head of the herd at home. Royal Crown was at the head of the young show herd.

We have a Shorthorn Association and have kept by it a Herd Book in which is recorded the pedigree or breed of each animal that is registered. Those animals were all registered in this Herd Book. That Herd Book is kept at Chicago, Ill.

147 We have these blank pedigrees sent to us and then we fill them out and send them to the Shorthorn Society and they return them to us. They look them over and see that they are correct and then return them back to us. I have seen the original pedigrees of the animals that I have in my hand. Those original pedigrees were in my trunk that went down in the wreck. They were lost in that wreck. These are correct copies of the originals which were lost in the wreck. From my examination of these copies that I have in my hand, my best recollection is that these are exactly the same as the original pedigrees that were lost in this wreck.

Royal Crown was a bull. I can't say exactly what his age was. I believe he was calved in August the year before. That would make him sixteen months old. He was calved in August, 1905. In 1906 he would have been a year old and to January would have made him say sixteen months old. Royal Crown would have weighed about 1300, I should think, at the time of this wreck. In my opinion about $500.00 would be about his value at the time of his death. We don't fix the market. We have to put our cattle on auction and it is done by what the people wish to bid. He was worth that sum anywhere. The market for such cattle as these was not confined to any special locality. There was not the slightest difference in the market value of such cattle as these in Oklahoma, Kansas, Nebraska, Missouri, Illinois, or Iowa. There was no particular place for the sale. They had public sales of these cattle at different places over the country. Some of those sale- were at Kansas City, Chicago, and different towns and all over the country and farmers sold them at home sometimes. Buyers come to the home. We have never had a public sale. They came to our home. It was the custom to go to those public sales. Mr. Harriman always attended the public sales.

148 Another animal lost in the wreck was Lavina. She belonged to the young show herd. I think she was about fifteen months old. I remember her sire very well. It was choice Goods. Her mother was Lavender of Tebo Lawn. In my opinion that animal was worth $1500.00. At the time she was killed she would have weighed from 1400 to 1500 pounds. She was a roan. That was at that time a fashionable color with the men who bought and dealt in that kind of cattle. It is just the same today. She belonged to the Scotch family. All those were Scotch cattle with one or two exceptions. Scotch cattle are worth a great deal more money than the other cattle.

There was an animal named Golden Bessie in this show herd. Golden Crown was her sire. That was the bull that was killed at the same time. I can't exactly tell how old she was. I guess she was about a year old—no she was not that old; I can't remember exactly. I think she was about a year old. I can't remember

exactly what her age was. No, she was not a year old. I would say that she was a June calf; I am not sure; June 1906, as near as I can remember. She would have been about eight months old according to my recollection. She would have weighed about 750 or 800 pounds. She was worth $1,000.00 in my opinion. She was of good Scotch breeding.

I named Golden Acorn. She was also of the show herd. I can't exactly remember her age. She was somewhere about the same age as the other. She was about the same age as Golden Bessie. She was sired by Golden Crown, out of—I forget her dam's name; we always called her Acorn, but she had another name at the head of that; we always called her Acorn. Golden Acorn was some seven or eight months old. She would have weighed about 700 pounds. Her color was red. She belonged to the Scotch family. In my opinion she was worth $1,000.00 at the time of the happening of this accident.

149 Golden Thistle was also a member of this young show herd. Golden Crown was her sire. Her mother's name was Fenel, Duchess of Thistlewood. She was a red. She was bred by Harriman Bros. I don't exactly remember her age. She was about the same age as the other ones though. I think she was a little older than the others. She would have weighed about 800 pounds. From $600.00 to $800.00 would have been her fair cash market value.

I went to Mr. Harriman's on July 10th, 1905. The bull at that time was a little over a year old, close on to two years old; we called him a yearling. Until he was two years old he was a yearling. An animal is three years old until he is past four. That is common and always understood by stock men. He had developed a wonderful lot from that time on. That bull weighed 2100 pounds at the time he was killed. I don't know exactly his age. I generally put the ages down, but I hadn't his age down because I wasn't there at the time. We called him a two year old. He was not three. That is my recollection. I have no personal knowledge. I never studied the pedigree of his age. He was one of the finest looking show bulls you would want to see. He was a wonderful looking bull. Any man that had not been accustomed to seeing such cattle wouldn't hardly believe they could be brought to that perfection. He was a very fine looking character; stood up and showed himself in great show style. He had a great head on him and perfect in every respect. His back was broad. He was close to the ground and had good hips and good shoulders. He was a bull that couldn't be beaten in the shoulders. He was red, with white hind feet. He weighed 2100 pounds. I had weighed

150 him just a week before. I didn't show that animal the year before. Mr. Harriman showed him. I was not with the herd the year before. I have been at Enid and Oklahoma City. The shows they have there are just as fine as other state fairs; a good deal better than some of them. There were seven herds shown for the herd premiums, but there were more in the classes. Different people would bring one or two in for the classes, but for

the full herds I think there were seven herds there. A great many people have stock to show there. I have been to shows in Kansas City, Kansas, and at St. Joseph and Sedalia, Missouri. We have a state fair at Sedalia. In Kansas, Oklahoma, Nebraska, Iowa, Missouri and Illinois there are people engaged in different districts in raising this class of stock. In different districts you will find a great many people. Now in our district in Cooper County we have a great many surrounding us. In Iowa we have a great many; all close together. In some of the states you will go a long ways before you find any, but there are a great many in Oklahoma and a great many in Kansas. At the shows I have mentioned there is a very strong competition for the premiums offered. I was at some of those places this year with Harriman Bros.' cattle. I started at Topeka, Kansas, and went to Hutchinson, St. Joseph and Sedalia and back to Kansas City. I had another show herd which I was exhibiting. I had a young show herd the past year. Golden Crown was the sire of the cattle I had this year. That is the bull we have been talking about. I won premiums this year with those animals sired by Golden Crown. We have never sold any of Golden Crown's calves, heifers. We are building up the herds. I knew the pedigree of Golden Crown. Among stock men that was what they term a fashionable bred animal. It was a fashionably bred animal. There were not any animals to my knowledge
151 better bred than he. This animal Golden Crown was a sire of show cattle. I base the statement that he was a sire of show cattle on the fact that I showed them and won premiums with them. He was a good breeder. He transmitted all his good qualities to his calves; everything almost was transmitted; perfect. That is not always the case even with good bulls. Some bulls, although having apparently the qualities do not uniformly get their like. There is a difference in the value of a bull as judged by his calves, the uniformity of the quality of his calves. An animal that gets uniform calves is worth twice as much money as one that doesn't get them uniformly. I have seen bulls such as Golden Crown sell. I can remember a few sales of such animals. I know the prices that were brought sufficiently to state what the market value of this bull was. I can remember a few. In my opinion the reasonable cash market value of the bull Golden Crown in January 1907 was from $5,000.00 to $6,000.00.

We had some cattle in this car that we expected to sell in the sale at Enid. These cattle were entered in the sale there to be sold. In order to do that, we sent the pedigrees and report of the cattle, what they were, to the secretary of the Fair and he entered them in the sale catalogue and that catalogue was published and circulated all over the country. There were other cattle also published; other breeders had cattle. I believe there were about sixty head of shorthorn cattle advertised for sale at that stock sale.

I believe I remember the names of these sale cattle. Mt. Vernon Butterfly 2nd was one, Roan Osa, Fenal Duchess of Thistlewood; Scotland's Beauty, Golden Block and Golden Scotchman; six head; four cows and two bulls. These cattle were in very good condition;

fat. They had received attention and preparation preparatory to being taken there for sale. I had been working on them
152 six months. There was expense attached to the preparation of these animals for the sale there. It was as much as a man could do in a day to take care of them, with the exception of feeding and that cost a great deal too. In my opinion from $250.00 to $400.00 apiece would have been the fair reasonable cash market value of these sales cattle. This Mt. Vernon Butterfly 2nd was worth $300.00. Roan Osa was worth $400.00. Fenel Duchess of Thistlewood was worth $400.00. These cows had been bred to Golden Crown. That added a great deal to the value of these cattle. We guaranteed them as in calf to the buyers. If they were not in calf, they were to be returned to us. If they had been sold, they would have been guaranteed to have been in calf. Golden Block was worth $300.00 to $350.00 as a bull. Golden Scotchman was worth about $300.00. Of course we don't know what they would fetch, but as compared to the prices such cattle brought on the market, I don't doubt but what they would have brought those prices.

We generally pay at home from $40.00 to $50.00 for nurse cows. The nurse cow's market value I think was $40.00 or $50.00.

We had equipment belonging to Harriman Bros. with these cattle. It consisted of feed and blankets for the stock and blankets for the men, halters, buckets and feed boxes, and everything necessary so that we wouldn't have to go around to buy to look after them; curry combs and brushes. The equipment we had with us was worth $150.00 or close to it I should say. I can't say exactly of course. I bought some of the things, but I don't remember what I did buy. They were things that had been used before and they were worth about $150.00.

153 Cross-examination.

By Judge HEAD:

I have been with Harriman Bros. since June —— two years last June. Before that I was with a man named N. A. Lynn in Northwestern Iowa—Roof, Iowa. Until I went with Harriman Bros. I hadn't been around Bunceton for some years before; I think it is three years; I am not quite sure. I was with —— Marshall at Blackwater, Missouri, then. That was about twenty-three or four miles from Bunceton.

These cattle are not high grade. The price of these aristocratic cattle does not vary over the country. It is not the same all the time. The values depreciate sometimes. About 1900, the cattle were worth more money at that time; that is, in Iowa. There were very large sales up there at that time, from 1900. They were worth more money really then than they were at our time. They were very good all along about 1902 and 1903 and along there. I don't hardly remember, but I don't think they were as good in 1904 and 1905. The prices from 1900 up to 1904, say, were a little better than they were in 1907 at the time this occurred. The prices of our cattle

have been very good since then. We have had good sales. Those sales were public sales where the buyers would meet and each man would put up his stock to sell. That is the principal way of selling these cattle. I don't recollect whether I was at a sale at Bunceton in 1903 or not. I was at a sale in Bunceton once, but I don't recollect when it was. I have known of sales at Bunceton, some of those public sales. I only know of one public sale at Bunceton that I was there. There may have been more than one public sale at Bunceton; I don't say there was not; but I wasn't at it. I was at once.

154 I don't know whether Harriman Bros. made any sales there or not. I don't remember. I know nothing about the sale of Mt. Vernon Bell. I am not sure I was there at that sale. I don't know the date. If Mt. Vernon Bell was by Ravenswood Admiral, that would not be an aristocrat. She was what we call Scotch stock. She was not a straight Scotch family. She is not what we call fashionably bred. Queen of Mary the 6th. was not an aristocrat if Ravenswood Admiral was her sire. She was Scotch stock. Edna, cow, by Goodenough 125269, was not an aristocrat. If I knew the dam of Scotch Beauty by Lochiel 119975, I could tell what she is. She is not an aristocrat. The sire is Scotch. Ravenswood Admiral, 147258, bull four years, sire Baron Flower, 114352—I would have to know the dam of that bull before I could swear what he was. I couldn't tell you unless I knew the dam. We haven't got any cattle now that are not aristocrats. Ours are all sold out. Ours are all aristocrats now. They were not in business in 1903. They didn't have any cattle in 1903. I am certain of that. I am not just simply playing on whether it is Harriman Bros. or W. P. Harriman & Son. I believe W. P. Harriman & Son were in business then. This is not the same herd they had. They sold out all of the old Harriman Bros. herd and started new with straight Scotch cattle, aristocrats. It just depends on what you think of it as to whether that bull's white hind legs and one white foot were good marks or bad marks. Some people might not like it. I wouldn't look at it myself. Among aristocrats I don't say that those white marks are either good marks or bad marks. It just depends on what you like. I say that doesn't depend on aristocrats among cattle men.

155 I say show cattle are perfect. You give one a premium over another on which is the most perfect. I did mean that to be a show animal it had to be a perfect animal; has to be a champion; had to be a champion because there are so many others that are nearly as good. I said there was a wide difference between a show animal and one that was not.

Judge HEAD: I wish you would explain to the jury how it is that there is such a wide gulf between them and why one just don't gradually come into the other so it is hard to tell when one is a show animal and when not?

The WITNESS: Well I don't know as I can explain it in that way. You get an animal, say a bull the same age as Golden Crown; you look at his head; he has got a rough head; look at his neck; got a scrawny neck; go to his shoulders; high shoulder blade, no flesh; his back is narrow, no flesh on his back—we don't want that; his

hips are rough; high tail; no flesh under here—we don't want that; just no beef on him; we want a round beef.

I mean to tell the jury as I stated that there was this wide gulf between show cattle and others that I have described. I didn't say anything about there being no such thing as an animal having a good wide back, a great eater and fine flanks and fine brisket and all, but a bad head. He has got to be perfect if he is a show animal. There are such things as giving premiums if they are not show animals if the judge doesn't know what he is doing. He don't know what he is doing when he gives premiums to them. Golden Crown had been exhibited before he was killed. I was not there. He was exhibited about the year before he was killed. I can't tell exactly the date. Mr. Harriman can give you the date.

156 He was shown at Oklahoma City. Golden Crown had never been stood up by perfect ones in St. Louis or Chicago. He was too young to take around them. There are not many great herds in Oklahoma. The class he came into competition with came from Missouri, herds that people brought down to advertise their stock the same as we were doing. That is where he came in competition. There were some herds in the country where he was exhibited. A great many of them were cattle that were brought there from a distance I believe. I was not there. I don't know how large a place Enid, Oklahoma, is; I guess about fifteen to twenty thousand inhabitants; I don't know though. I was there last year, in February I believe. I did not continue on after these cattle were killed. I went back again. What was I going to the show for? I had nothing to take. I didn't attend the show there. That was in 1908. I was there at the show in 1908. I was Harriman Bros.' representative. They sold some cattle there. I don't remember what they did sell now. I couldn't remember. I was there in charge, but I don't remember what cattle they sold. I don't know how many they sold. I don't think they sold six. I don'- know. I know they sold three, but I don't remember how many. I couldn't tell the highest price they got without looking at the books. I can't give the prices they got there for the cattle they sold at Enid last year. I can't give the price of a single animal they sold. I don't remember. I couldn't give the price of any animal. Most of them they sold there were some they bought to put in the sale. They bought some to put in the sale. I don't remember the price of one single animal they sold. Of course I could tell the prices if I had my books. I can't remember those things unless it is a big price or something special. I don't know the name of a single one. I can't remember. I don't

157 remember whether there was any one sold there that was a son of Golden Crown or not. I don't know what Harriman Bros. gave for Golden Crown. I never heard them say.

Lavinia had never stood up in the show ring. Golden Bessie had never stood up in the show ring; neither had Golden Acorn nor Golden Thistle. There is a great deal of difference in the ages at which cows are at their highest value. Some cows would be at their best as long as they live. Some cows you can breed until they are sixteen years old; good until they are sixteen years old. You can't

go and sell a fifteen year old cow at as good a price as you can sell a five year old. That is not to be expected. I should say that a cow is at her best saleable value at from seven to nine years of age. They would be the two years that she would breed best as a rule. I would put at seven to nine is when she would breed best. I didn't say she would bring the best price on the market at that age. She would be at the prime of her life for sale on the market at seven years old. Seven years old would be her saleable age—well, from that up to nine. I couldn't tell you the average age of an aristocratic cow. They get pretty old, some of them. I have one instance I can quote you of a shorthorn cow, very valuable cow; Gwendolin Second was her name. I knew her from the time she calved and she lived to be sixteen years old and had sixteen calves and the sixteenth calf was the finest one she raised. She brought her first calf when she was two years old. She never brought twins. That one cow brought sixteen calves. Her youngest calf was just dropped, just calved, when she died. That cow was at different places. She died in northwestern Iowa at N. A. Lynn's. H. F. Brown in Minnesota had two cows that lived to be eighteen years old. About twelve years I would say was the average of one of those pampered
cows that was kept big and fat all the time, ten to twelve
158 years. From ten to twelve years would be the average age
I would say. I don't know exactly what the age of Mt. Vernon Butterfly was, but I believe she was about eight years old. Golden Block was a bull calf. Roan Osa was about eight years old. I don't remember the age of Scotland's Beauty exactly. She was a young heifer, but I don't remember her age exactly. I couldn't tell without the records. Fenel Duchess of Thistelwood was about eight years old. Three out of those six were, I estimate, eight years old. I don't mean by that that they were eight years old the spring past. I mean they were eight years old at that time. I am not sure what their exact ages were, but that was the age I would estimate them to be. I hadn't got acquainted with the cattle. I was just estimating their ages according to my best judgment. Golden Scotchman was a boy. I did not consider Roan Osa an aristocrat. She was not an aristocrat. She was Scotch stock. I don't know how long they had owned her. I had only gone there the summer before so I don't know how long they had owned her. Mt. Vernon Butterfly was not an aristocrat. Golden Block was not an aristocrat. He was Scotch stock the same as the others. Scotland's Beauty was Scotch stock. She had aristocratic breeding on one side; just had it on one side. I don't remember what Golden Scotchman was. I saw his pedigree. Harriman Bros. have nothing now but aristocrats. They have nothing at the present time but aristocrats. I did not intend for the jury to understand that Harriman Bros. had nothing but aristocrats killed in this wreck. When I said a while ago that Harriman Bros. had nothing but aristocrats*k* I didn't intend for the jury to understand that they had nothing but aristocrats killed in this wreck. They have nothing but aristocrats at the present time. One of those
show animals was out of Fenel Duchess of Thistlewood. I
159 didn't say she was an aristocrat. I didn't say that those show animals were all aristocrats. Golden Thistle I believe was

the one that was out of Fenel Duchess of Thistlewood. I believe her name was Golden Thistle. Golden Thistle was out of this Fenel Duches of Thistlewood. I can't say which cow Royal Crown was out of. I couldn't tell who was Royal Crown's mother without the records. I believe it as Roan Osa. Royal Crown was not an aristocrat only on one side, but he was a show animal. I don't know whether there is a cow named Carnation Charm or not. We haven't one that name. We raised Golden Acorn the calf. Her mother was named Acron; I forget the other name of it. I am not mistaken about that. Her mother was not named Carnation Charm. I am positive of that. Harriman Bros. had Golden Acorn's pedigree registered. I am positive that her mother was not named Carnation Charm. I don't remember the name of Golden Bessie's mother. They raised her. They had a cow at that time named Ortiz Bessie. They have her now. I don't know what Ortiz Bessie was by. I don't remember her sire. She was an aristocrat. If she was by Ravenswood Lavender, she was an aristocrat. If she was by Ravenswood Lavender Viscount, that would not make her an aristocrat unless her ancestors were aristocrats. If she was out of Butterfly of Hazelridge, that is all right. That would not make her an aristocrat, but that is good. Just two of the show cattle had cold blood in them—the heifer out of Fenel Duchess Golden Thistle, and the bull calf. I did not say Golden Acorn was out of Roan Osa. Her mother was an Acorn; I forget her other name; we have always called her Acorn.

I stated that show cattle had to be perfect. We just confine that to the physical characteristics and not to the pedigree. We don't carry that through to the pedigree.

160 J. F. STODDER, being sworn and introduced as a witness by the plaintiffs, testified as follows:

Direct examination By Judge WOLFE:

My name is J. F. Stodder. I live at Burden, Kansas. I am engaged in the stock business. I am breeding shorthorn cattle. I have been engaged in that business about fifteen years. Since I have been engaged in the business I have attended the fairs, shows and sales of shorthorn cattle a good deal. I take papers and periodicals published relative to this stock. The most highly prized breed of shorthorn cattle are what are called the Scotch cattle, and were in 1907. I have attended the shows and sales of this character of cattle. I have also acted as judge at some of these shows, judging the cattle as to their merits and awarding the premiums. The money that is put up as premiums comes largely through the state fairs or county fairs or what we call the breed shows. The National Association furnishes money to some of these shows. The National Association furnishes money to all the large shows. The money that the Association offers as premiums on this class of cattle runs from $100.00 down to $5.00 at the individual fairs. I am inclined to think that the American Shorthorn Breeders Association offers

something like $30,000.00 or $40,000.00 a year to the different shows for shorthorn cattle; possibly more than that.

I have some knowledge of the cattle bred by Harriman Bros. I have seen some of them. I saw some of their stock in 1908; last year. I saw them at the American Royal show at Kansas City and at Enid, Oklahoma. I wasn't at Hutchinson or St. Joseph.
161 I did not attend the fairs near about home quite as much as usual last year. I was called upon to go somewhere as a judge last year. I went to the Pacific Coast to the Oregon State Fair. I was a judge at some of the fairs on the Pacific Coast. I was judge at the Oregon State Fair at Salem, Oregon, and at the Pacific Exposition at Portland, Oregon, and I was also one of the judges at the Oklahoma Fair at Enid during the year; not last fall, however.

I saw the bull Golden Crown that was owned by Harriman Bros. I think it was at Oklahoma City that I saw him; at the State Fair there. He was exhibited there. I remember seeing him there once. I am not sure that I saw him more than once. They show cattle sometimes as herds, and sometimes as individuals, and sometimes as sweepstakes at one meet; different classes. Golden Crown was probably shown three or four times. In the Grand Championship show, they come in competition with the first prize winners in the different classes and different ages. It is a sort of sweepstakes; just all ages and classes put in together. They have a class for aged bulls, and two year old bulls and yearling bulls and bull calves and these sweepstakes consist in bringing together the first prize winners in each one of these classes for the grand championship. The bull Golden Crown was shown in that class for grand championship. He won grand championship at the Oklahoma State Fair; that is, over all the prize winners of all the classes irrespective of age. That carries with it the fact that he won in his own class or else he couldn't have been exhibited in that. There was not anything higher than the grand championship at the show. That was the highest honor that any animal could get. I don't know whether it was four or six animals, bulls, that were shown in that ring at that time. There might have been either one. Those were the first prize win-
162 ners. He was exhibited in sweepstakes senior sweepstakes. He won. In that show he won every time he was shown. The show there was what was called a high class show. Herds were there from three or four different states, what are known as the best herds from those states, and the exhibit was rather large. There were a great many cattle there.

I was in Enid, Oklahoma, last year, in 1908. Harriman Bros. had a show herd there. I think that show was in February 1908. I believe it was in February. About a year ago now. My recollection is that it was a young herd they had there.

I think I know what the reasonable market value of such animals as the bull Golden Crown was in the neighborhood of Enid in January, 1907. In my opinion he was worth from $3,000.00 to $5,000.00 on the market at that time.

I heard of the accident in which Golden Crown was killed. I can't

say that I knew the other animals that were killed with him especially. If I knew them, I don't remember it. I don't know whether I did or whether I did not ever see those other animals.

Cross-examination by Judge HEAD:

My own herd is at Burden, Kansas. I am two hundred and thirty miles southwest of Kansas City. Bunceton is over southeast of Kansas City somewhere. It must be three or four hundred miles from Burden to Bunceton. We can leave our place in the evening and get down to Oklahoma City about one or two o'clock at night. I don't know the distance. That is the way you go on the
163 train. I suppose it is one hundred and seventy-five or two hundred miles from Burden to Oklahoma City. I did not have any herd at the Oklahoma City fair. I did not have any at Enid this last year. I raise shorthorn cattle. I have the Scotch cattle and I also have what we call the plainer bred kind; Scotch Top what we call them. Scotch Top are not as good as the straight Scotch. They don't sell for as much. There is a man by the name of Combs that has a lot of Scotch cattle that lives somewhere near Oklahoma City.

Golden Crown was a red bull that was exceedingly well developed for his age. Apparently, to look at him, he weighed very heavy for his years, for his months old. He was a remarkably thick fleshed bull. He was a bull of excellent lines very evenly balanced. He was a bull that was close to the ground. He had a very fine shorthorn character. By character I mean that in looking at him you would know from his looks that he was a typical shorthorn, a shorthorn that was of high type, the best type, valuable type. Color has nothing at all to do with the Scotch cattle. They vary in color. They may be red or white or intermediate colors; that is, they must be red or white, but they have combinations so that they will be roan or may be spotted with red and white. In the show ring if cattle are spotted, it wouldn't be of any value one way or the other. It wouldn't make any difference how spotted they were in the show ring. The spotted cattle are not liked quite as well generally as what they term solid colors. I have got a bull that is at the head of my herd. He is red. He has got a little star in his forehead. That is practically about all the spots he has got on him. He is solid red. His name is Captain Archer. I have owned him three years, pos-
sibly. I spoke of the value of this bull in the neighborhood
164 of Enid. I don't know that I know of any sales in the neighborhood of Enid in January or February, 1907. There might have been, however. There was a sale at either Oklahoma City or Enid; I have forgotten which. There might have been a sale at Oklahoma City in 1907 or it might have been at Enid. I have forgotten which place. There was only one sale that I attended. There might have been other sales. I don't know of any Scotch Durham bull that was sold just especially in that neighborhood; I don't know that I do. I don't know that I know of any sales. I don't recollect it now. Captain Archer was about a three year old bull when I got him; two or three. He is not as good an

individual as Golden Crown. Captain Archer's bad point was he just simply didn't have the confirmation to go into the show ring and win. He is top of my herd. I am breeding and selling high grade cattle, thoroughbred cattle. I don't know that I would call them aristocratic cattle; I would not call Harriman Bros.' herd aristocratic altogether as distinguished from my herd. The Harriman cattle are a very choice herd of cattle, but a small herd. I am in competition with Harriman Bros. I sell thoroughbred cattle. I gave between $600.00 and $700.00 for Captain Archer, Fredonia, Kansas.

Redirect examination.

By Judge WOLFE:

This bull at the head of my herd is called Captain Archer. He has not got such points as has ever induced me to exhibit him in the show ring. He is not exactly what we term a show bull. He is a good bred bull, but still has not the points about him that would make it justifiable for me to enter him in the ring of his
165 class. He is an excellent bred bull, but not exactly a show bull. There is a great deal of difference in the value of two bulls of the same breed, one of which has show qualities and the other has not. There might be anywhere from $1,000.00 to $6,000.00 or $7,000.00 difference in value. There is a great difference in the way those animals are valued.

Judge Head asked me if I had known of a sale of any bulls about Enid or Oklahoma City in that neighborhood there. I know Mr. Combs. I mentioned him. I know of a sale by Harriman Bros. to Combs of a young bull. That was more of a sale bull than he was a show bull. However, Mr. Combs, as I understand, showed him. I believe I saw Mr. Combs show him once after the purchase.

Recross-examination.

By Judge HEAD:

I don't know the price that bull was sold at from my own knowledge. I have heard what the price was. I may have heard it from Mr. Harriman. My recollection is that the price was $800.00 for the calf. I presume he was ten or eleven months old possibly.

I attended a sale somewhere in Oklahoma in 1907, but I don't know whether it was Oklahoma City or Enid in that year. I did not attend any sales in Oklahoma City this last year. I attended a sale at Enid in 1908. I think Harriman Bros. sold some cattle there. I don't remember at what prices they were sold. I don't remember what prices they brought. I couldn't answer what was the highest price that any animal brought at public sale at Enid in 1908 nor what kind of an animal it was. My impression is there were some animals sold at between $200.00 and $300.00 there. That is my impression, but as to the quality of those animals or
166 what they were, I don't remember what they were. I can't remember the kind of animals. There were a great many cattle sold there at that sale; probably sixty or seventy-five; perhaps

more than that. I think some of them brought as high as $200.00 or $300.00. I shouldn't think that anything sold for over $300.00 there. I don't believe that anything sold there for over $300.00, but I might be wrong about it. I am not certain that anything brought as high as that. I should think the average price at that sale might have been somewhere from $100.00 to $125.00 a head. I have no very distinct recollection of either the sale at Oklahoma City or at Enid in 1907. I am inclined to think that one bull sold there for $600.00 or $700.00 possibly. I am not sure that that was the year. I would say that the average sale there during that year of cows and calves and bulls was -bout the same as the other year; around $100.00 to $125.00 would be my best recollection of it. That $100.00 to $125.00 would not be a fair average of those public sales all around over the country, Kansas City and those places. The cattle that were sold at Enid were, a great many of them, picked up in the neighborhood of Enid and had had no preparation and were a very poorly bred lot of cattle and in very poor condition and sold over, I think, what they were actually worth. The cattle that were taken down to Enid and Oklahoma City were cattle that were not suitable to go to those other places. They were a poor quality of cattle is what I mean to say. The cattle that were at Oklahoma City and Enid for the two sales I attended were a poor grade of cattle.

Redirect examination.

By Judge WOLFE:

These cattle that are termed show cattle are not sold very often at public sales, at these sales. It is not common to sell them at public auction. Those cattle that are brought put in the
167 public sales, nine times out of ten they are the poorest cattle a man has got.

R. L. HARRIMAN, being sworn and introduced as a witness for plaintiffs, testified as follows:

Direct examination by Judge WOLFE:

My name is R. L. Harriman. I live at Bunceton and Pilot Grove in Cooper County, Missouri. On the 30th day of January, 1907, the firm of Harriman Bros. shipped some cattle over the M. K. & T. Road. I am a member of that firm. I did not load the cattle. Our firm shipped them. My partner, Mr. Bert Harriman, and our herdsman, Mr. Minton, loaded them. I was not there at that time. I have never seen those cattle since they were shipped. I have been engaged in breeding and handling shorthorn cattle practically all my life; not all the time, however. My connection with this firm and with this herd dates since the spring of 1904. I have been connected with the firm of Harriman Bros. since 1904. We call show cattle cattle that are high enough classed in individuality to contest for prizes in the show ring. There is a difference in the market value or selling price of cattle which are termed show cattle and other cattle of the same breed. There is a very wide difference in price. The

price of show cattle as compared to other stock of the same breed varies, say, from three to eight times as valuable; average about four time- as valuable I would think. One thing that gives to them superior value is their value for breeding purposes. There is a law of nature that like produces like. A good show cow bred
168 to a good show bull is very apt to produce a high class valuable show calf. Then they are very valuable for show purposes alone. A good show animal or good show herd of show cattle can earn a good deal of money in the show ring. They have this increased value, among other reasons, on account of the money they will secure as premiums in these shows. They are very valuable to a breeder because of the reputation they can make for the herd to which they belong and the man they belong to. We think that for every dollar premium we get we make two dollars worth of reputation. Reputation is worth something to a man breeding. It is a very valuable asset to any business man, particularly a cattle breeder. Those three reasons are the principal reasons why show cattle have the additional value; valuable as a breeder and valuable to earn money in the show ring and valuable to get advertising and reputation. The premiums offered in these stock shows such as I spoke of are liberal. Of course the size of the premiums vary, but a great deal of money is being given out in prizes by the Shorthorn Association and the state and district and national fair associations at their shows and fairs for the encouragement of better cattle. I think it is accepted by all breeders both in this country and in England and Scotland and Canada and South America that the Scotch cattle are better cattle than others. They have more merit as beef cattle and as dairy cattle. They are noted for their milk as well as for their beef. They are considered the greatest beef cattle and very great dairy cattle.

We bought the bull Golden Crown from Peden Bros. of Spencer, Indiana. He was a yearling when we bought him. He might have been called a long yearling. Among cattle men we reckon
169 cattle's ages that way. They are yearlings until they are two. On the 30th of January, 1907, he was three years old. He lacked probably five or six months of being four years old. He was really some three and a half years old we will say. I know his pedigree. He was sired by Imported Golden Fame out of Imported Enchantress by Prince of Fashion, best sone of the great Scottish Archer. Among shorthorn breeders the breeding of that animal is held extremely fashionable. After we purchased this bull we gave him good treatment. He made a very remarkable development. He was a wonderful feeder and responded to good treatment, developed beautifully. I didn't weigh him. Mr. Minton weighed him. I think he would weight a ton or over at the time of his death. He was a large bull. At that afe these cattle don't stop growing and taking on flesh. I should think he would have gone ahead taking on weight another year and made a twenty-five hundred pound bull. We exhibited this bull at some of the shows. We exhibited him at the State Fair at Sedalia, Missouri, when he was two years old and at Oklahoma City the winter following. He was still a two year old.

I held him in the show ring myself. He was a prize winner at both places. He never went in a show ring that he didn't win a prize. The competition for the award at Sedalia where he was exhibited was very fierce and it was a high class show at Oklahoma City. I couldn't state exactly how many bulls were exhibited in his class at Sedalia. Sedalia ranks as one of the strongest state fairs in America and there were herds there from ten or twelve different states, Minnesota, Wisconsin, Ohio, Indiana, Kentucky, Iowa, Missouri, Kansas and all over the shorthorn section. An animal that can win at Sedalia can win anywhere in the world. The fair at Oklahoma City is one of the biggest of our western shows. It ranks with Denver and Fort Worth and they are all regarded as very prominent, strong
170 shows. We did not have a herd with this bull that season. The show bull is all we had there. We have some calves of this bull. We have exhibited them. We showed a young herd the year after he was killed both at the Oklahoma show and then through the state fairs in Kansas and in Missouri; at Topeka and Hutchinson, Kansas, and St. Joseph and Kansas City and Sedalia Missouri; the strongest shows we have. In 1907 we had no exhibit. That was the year this herd was killed. We had no show herd that year. The past year we had a show herd. That herd consisted of four heifers sired by Golden Crown and a young yearling bull that was sired by Orange Viscount owned by Thomas Mitchell. I raised the calf; bought his dam and raised him. She was bred.

I am in the habit of attending the shows and sales of fine cattle in my state and surrounding states. That is my business. I don't do much else. I make a specialty of it. I think I am acquainted with the prices of such cattle, such show cattle and such bulls as Golden Crown at Enid, Oklahoma. I think he was easily worth $6,000.00 to $8,000.00 judging from the way bulls like him have sold. He was a wonderful sire most remarkable sire. That certainly would double his value. It is a matter of record and my opinion that he sired more show cattle in two seasons—he sired more show cattle than any bull that we know of in America. It was his great faculty to transmit his good qualities to his get. All bulls don't do that. Some of his calves were red and some were roan. We showed a pair of twin heifers sired by him and out of the roan cow in the picture here this year and they won in their class and as produce of cow. They were twins. They were yearlings. They were about fourteen months old when we were showing them I think
or fifteen months during the fall fairs and they weighed
171 twelve hundred pounds. One of them weighed thirteen hundred and the other a little over twelve hundred. They were remarkably beautiful heifers and very evenly fleshed and showed a great deal of breeding, character, handsome, attractive cattle, show cattle. The young show herd that we showed the past year consisted of five animals, a bull and four females. The four females were the get of Golden Crown. They have to be bred by the owner. We had another bull that Golden Crown got that was a winner. We really had six animals in this show herd, four heifers and one bull got by Golden Crown and one bull that was not his get. We have

quite a number of heifers in our herd that are the get of Golden Crown, females. We haven't let *amany* of them go. We have sold a few of his bull calves. We have kept mostly females. We have sold a few of those calves privately and a few at the sales at Kansas City and Oklahoma mostly. Our best trade is west of us. We have been selling mostly in the west, in Kansas, Oklahoma, Texas and New Mexico, and out as far as the Pacific Coast, Oregon, Washington, Idaho. We sell some cattle east of the Mississippi River, but not a great deal. Harriman Bros. haven't got a large herd of these cattle. Our purpose has been to establish a herd that would be great in quality and not in numbers. We have probably fifty head of females. They are all Scotch cattle now. I think the original color of shorthorn cattle was white. They afterwards bred them into the roans and they are all colors now. They are red and white and roan; some of them red and white. It is common to find one that is a solid red without any white at all. They are frequently red. A great many of them are roans; different shades of roan, some lighter and some darker.

172 I think I know the names of the other cattle that we had killed that constituted our show herd. In the young show herd there was a young roan bull, Royal Crown, and there was a yearling heifer, roan heifer, Lavinia, and there were three younger heifers, probably a little under a year, Golden Bessie Golden Acorn and Golden Thistle. The last three were the get of Golden Crown. The bull was sired by Scotland's Crown, a Scotch bull owned by Mr. Littrell of Sturgeon, Mo., and bred by Mr. Dustin. Lavinia was sired by world's champion Choice Goods. He defeated every bull at the World's Fair—World's Fair Champion I might have said. I should not have said world's champion. I meant World's Fair champion. By Wor-d's Fair I mean the exposition that was at St. Louis. I think it was 1904. The show at the World's Fair was no greater than the International at Chicago and the American Royal at Kansas City. I was at all those shows. We call the mother cow the dam in shorthorn parlance. The dam of Lavinia was a pure Scotch cow called a Cruikshank Lavender. She was a daughter of the great imported bull Collynie owned by Mr. Hannah of Missouri. She was a magnificent cow. Lavinia was probably fifteen months old. I think she was the best daughter of Choice Goods I had ever seen. She would probably weigh twelve hundred pounds. I think she was easily worth $1500.00 in January 1907.

Royal Crown was sired by Scotland's Crown. His dam was Roan Osa. She was a very good cow of fair breeding; not a Scotch cow and not what we call a really high class cow. The sire was a Scotch bull. The dam was what we called a Scotch topped breed. She had proven a great producer though. Roan Osa was a thorough-

173 bred cow, but not of the pure Scotch blood. She was probably seventy-five per cent Scotch. They must be traced to pure Scotch foundation in order to belong to the Scotch cattle. The family she belonged to was the family of Young Mary. We had a few of these Young Mary cows that we kept and they produced some very excellent cattle for us. Roan Osa was what was termed a fine

cow, but was not in such favor as the pure Scotch bred animals. She was a splendid individual, but could not be called fashionably bred because she wasn't p-re Scotch. That had an effect on the selling price of her offspring. Good individuals would be worth half as much as if she was a pure Scotch cow.

I think the bull Royal Crown was reasonably — from $600.00 to $700.00 at Enid in January 1907. He was about a sixteen months old. Golden Bessie was sired by Golden Crown Her dam was Ortis Bessie by Ravenswood Lavender Viscount. She was a Cruickshank Butterfly, no better family, pure Scotch family. She was easily worth $1,000.00.

Golden Acorn was a red heifer probably nine months old. She was by Golden Crown out of Carnation Charm by Barmpton Bud. That is a pure Scotch family of the Acorn type. That strain of Scotch cattle ranks right at the top. She was worth $1,000.00.

Golden Thistle was a red heifer about eleven months old is my recollection, sired by Golden Crown out of Fennel Duchess Thistlewood by Thistlewood. Golden Thistle was one of the best individuals in the herd. She was not a fancy pedigre- that is, not so fashionably bred probably as the three Scotch heifers. She was worth $500.00 or $600.00 I think. If she had been a Scotch heifer she would have been worth $1200.00. She was not a pure bred Scotch heifer on her dam's side.

174 The sale cattle were cheaper cattle. There were no Scotch cattle among those sale cattle, but there were three good bred cows, Scotch topped cows, Roan Osa and Mt. Vernon Butterfly, two big roan cows like the roan cow in the picture—they were eight years old—and Fennel Duchess Thistlewood which was also an eight year old cow. Fennel Duchess of Thistlewood was not so good an indificual as the other two, but they were all good producers, heavy milking females. There were three youngers things, two bulls and a heifer. The young bulls were Golden Scotchman and Golden Block. The young heifer was Scotland's Beauty. She was not pure Scotch. The two bulls Golden Scotchman and Golden Block were good Scotch topped animals. They were registered, but were not pure Scotch animals. We did not raise all the sales cattle. We didn't raise the three cows. We didn't raise Mt. Vernon Butterfiy or Fennel Duchess of Thistlewood or Roan Osa. We raised the rest of them. I think the three cows were eight years old. Golden Block was about eight months old. I think the heifer Scotland's Beauty was about seven or eight months old. She was the youngest one in the bunch. Golden Scotchman was older, probably eleven months old. I think Mt. Vernon Butterfly 2nd was about a $300.00 cow the way we sell them. Golden Block was worth about $200.00. Roan Osa was worth $400.00. She had produced a first prize winner at the Kansas City Royal that we sold to Mr. Green of Texas for $700.00. Scotland's Beauty was worth about $200.00. Fennel Duchess of Thistlewood was worth $300.00. I think I stated Golden Scotchman was worth $200.00. I did not know the Jersey cow very well that has been mentioned in the testimony as the nurse cow

that was in this herd. I don't pay much attention to the
175 nurse cows. I don't think I could state what they took along.
We have several nurse cows. I don't know the particular one that was taken. The outfit and equipment was the herdsmen's outfit. It included probably a dozen fine show halters that cost $2.00 apiece and a lot of buckets and show blankets that cost all the way from $2.00 to $4.00 apiece, and then they had their bedding. I don't know what that was. I know what the blankets and halters cost because I wrote the checks to pay for them.

Examination by Mr. HARE:

The bull Royal Crown and four heifers constituted the show herd. The bull Golden Crown was not a part of that show herd. That was composed of the five young cattle. A show herd has a value as a herd. In those exhibitions at the fairs they have premiums for the herds as well as individuals; aged herds and young herds. I gave the value of each animal to Judge Wolfe. That did not constitute the entire value. It is about the crowning glory of any breeder to bring out a young show herd that can win. It is the greatest attraction to the herd, we think, we can have. It is about the hardest thing to do to get a young herd that are good enough to win because there are so many young show cattle. We think they are worth at least one-third to one-half more as a show herd than they would be separated one in one herd and one in another.

Cross-examination by Judge HEAD:

This herd had never won as a show herd. I don't mean that the
mere fact that a breeder picks out four or five and calls
176 them a show herd it adds one-third to one-half to their value.
With reference to this herd I mean they were genuine show cattle. They had never won. We had selected them for this special purpose from the very top of our herd and had gone to a great deal of pains and expense to fit them in that condition that we know they are show cattle. I did not say that the mere fact that we put them in a herd without their ever having won adds to the value of these individuals. That is not the way this actually existed. Not the mere fact that we put them together and called them a show herd, but the fact that they had been carefully and elaborately fitted and were a young show herd. I did not say that in addition to the values that I put on these animals, that the fact that we had put them in a herd would add one-third or one-half to their value. I mean the fact that they were a young show herd; that they were in a herd, would add one-third or one-half to their value. We have never sold a herd as a herd. I have seen a herd sell as a herd. It was at Kansas City six months before this wreck happened. A herd sold as a herd. That was the Tebo Lawn dispersion sale. They were raised in Missouri fifty miles from where I live. There were seven head and averaged $1900.00. They were sold at Kansas City on the 20th of June, 1906. That herd was composed of the young

cattle that they had in their last year's herd. It was composed of a young bull and young show herd and an aged bull went in. There were seven of them, and an aged bull among the number. That was the Tebo Lawn herd. The aged bull went in at $5500.00, and all averaged $1900.00. I am an auctioneer. I have gone around to a great many of these sales. I stated that the value of show cattle is also estimated by their winning premiums; that that is profitable.

I think it was in 1906 we began showing cattle after we went
177 into the business. We had no show herd that year. We had the herd bull Golden Crown as a two year old. We exhibited him first in 1906 in Sedalia, Missouri. He was a winner in his class there. His class there was as a two year old. He did not take the first prize. He was third. I don't just remember the amount of money. I think the prizes were divided about $50.00 to first, $40.00 to second and $30.00 to third, right on down to eight premiums. We hadn't had him but a part of a season at that time. We hadn't been at very great expense fitting him and he wasn't very well fitted. He had probably had four months' fitting and it cost about $150.00 to put that on him. I don't remember how much it cost to get him to Sedalia and take care of him while we were there. We are not far from Sedalia. It cost something, and it cost us something to take care of him while he was there. We next showed him that season at Oklahoma City. That was in 1906. We had not shown him the previous year at all. We had only had him a year you know. We showed him at Sedalia in the fall and Oklahoma City in the Mid-Winter show. That is the show that has been testified about. We had another show animal there. I said we had this bull and a yearling bull. We had a yearling bull at Oklahoma City. I will give the prizes that Golden Crown won at Oklahoma City if I can remember them. I think the two year old bull class prize was $50.00. He won that. I think the senior sweepstake class was about the same; say the same. He won that. The gran- championship class was $100.00. He won that. That would be $200.00 in prizes he won. It is pretty expensive business fitting show cattle. I couldn't give in dollars and cents what it cost to put him in shape for that fair. I am not the fitter. I attend to the buying and
selling and Mr. Minton does the fitting. The other bull that
178 we had won first prize in his class, yearling class. I think it was probably $40.00. The classes are graded down. The older classes paid a little more money and as we got down to calves it wasn't so much. The yearling bull didn't win any other prize at any other place. That is the only place we showed him. He wasn't up to the class of Golden Crown. He was a very good bull. He was a good class animal, but not so good as Golden Crown because Golden Crown beat him in the grand championship show. Oklahoma was not a new country as to cattle. They have a great many blooded cattle there.

Mr. Lyons has a very strong herd of Scotch cattle close to Reno. Mr. Combs has got a good herd of cattle. Meyers has a good lot of cattle. Quite a number of them have good cattle in Oklahoma. It is quite an important show, I have told the actual money those two

bulls got in as to winning the premiums. We had no others that year. I stated in my direct examination that we estimate that for every dollar we win in cash prizes we get two in reputation. That is what we show for. I said the show herd was very profitable on account of the advertising they would give and the cash premiums they would win. Part of the profits at that Oklahoma show came in the sale of the young bull that I spoke of, the yearling bull. We sold him there. I said one of the big profits was the prizes we would win. I did mean that the prizes we would win if we had a good show herd would equal the expenses by itself. A good winning herd will make money. I have given all of the money that we won that year. I say to the jury that that was a profitable year, but not on that ground. I didn't say on that ground. It was profitable for us to go there and the *the* young bulls. If it had only been a matter of the money we would take in, I don't say that that was a profitable year, leaving out the advertising. The money that year did
179 not amount to enough to be called much profit because we had no show cattle but one to amount to much and we only went to one show. Possibly the expenses of handling and preparing them exceeded the money that we got in on prizes. We don't figure a year's feed and one show to compensate. We had the Sedalia show. I would think they wouldn't make any money of course that year. In 1908 our show herd consisted of one bull by another animal and then four heifers and another bull that we took along. We began showing them at Topeka, Kansas. I couldn't state all those prizes we got there. I was on the Pacific Coast while we were showing there. I think our young herd won more prizes than probably any other young herd. I couldn't give the exact prizes because I wasn't with the herd through Kansas. I did not handle the money when I got back. I don't know the amount of money that was won and prizes that were won at Topeka. There were some among them that were first. I know because the papers showed it. I got accounts of the show in the papers. I can't tell just what we won there. I do know there were some first. I say I don't know what amount of money we got in prizes there. From Topeka we went to Huchinson, Kansas. I don't remember the amount of the prizes we won at Hutchinson. Our young bull—we had two bulls—won first in class and one of them won Junior Championship and our heifers were up and the young herd was either first or second; I don't just remember. I was three thousand miles from there. I could give the places probably that the cattle won but I am not undertaking to give the amount of money in either place. They next took them to St. Joseph. I think they had about the same success there. I wasn't there. I was away. I can't give the money at any places. I think the amount of money that we get in prizes pays the expenses that we are at showing them? I think it
180 did this last fall. It would be an approximate as to how much more it would be. It would be a *guess*. I am sure the amount of money we got in prizes this year more than paid the expenses. I could only approximate the amount. I was away a great deal. The prizes at those places ran from $100.00 down to $25.00.

My best recollection is that our young herd averaged about $300.00 a week, their prizes. We were out five weeks. I couldn't give which prizes they won or the amounts unless I had the records of the shows.

This suit was brought here instead of at home because I preferred the State Court of Texas rather than the Federal Court of Missouri.

We bought Golden Crown from Peden Bros., Spencer, Indiana. We bought him together with some other cattle, two cows and a calf. There were four head. While I didn't go over and buy the cattle and didn't give the check, my recollection is that the bunch cost us about $1200.00 laid down at home. Golden Crown's mother wasn't in the bunch. We didn't get her. I did not make that purchase myself. The four head cost us about $1200.00 laid down at Missouri. That means the original price and cost of carriage. Now that is an approximate. I don't just remember. I think it was about $1200.00 or $1300 something like that. We got them cheap. I don't know whether the original cost was eleven hundred dollars and something and carriage added to it or not. I think that was about it. I heard of the cattle and sent my partner and nephew over there to buy them. Golden Crown was a yearling past at that time. The four included him. There were two old cows and one calf. We didn't want the cows but had to take them to get the bull. I couldn't state what month it was we bought Golden Crown. I think it was in the spring of 1906 or 1905;
spring of 1905 I guess; early in the spring. I think it was
181 early in the spring of 1905, probably February. He was
then a yearling past, between one and two years old. I think he was coming two years old along the next summer some time.

We have a bull at the head of our herd now. His name is New Goods. He is red. He has a little white on him. He has a white spot or two on him. He has some down on his legs, spot in his forehead and a little in his flank. We don't consider that very much. We don't think that a good animal has a bad color. The color is all right. It is regarded as an objection if they are speckled all over. I think that as a rule they don't like that very well.

Our present firm of Harriman Bros.—the brother is really my nephew. He loaded these cattle, he and Mr. Minton. I was not there at all that day. I don't just remember whether I was at home or away from there. I think I was making a sale probably in the neighborhood there. I had nothing to do with the loading. He is the one whose deposition was read on yesterday.

None of this present herd now is descended from the herd of Harriman & Son—well, I think we have just a few cows left that we bought out of the old herd. Possibly we have a few calves that came from the old herd; not many. Roan Osa came from that old herd. We have no descendants of her. She had two calves killed in the wreck. They cleaned up the family. The Mt. Vernon Butterfly cow belonged to the old herd. We have no descendents of hers. We raised this bull that we have got now at the head of our herd. We have no bull at the head of our herd that we pur-

chased; not since we lost this bull. The highest price we ever sold a bull at was $1,000.00; sold three past nine months for $1,000.00 each. They were all calves, yearlings. Sold one to Mr.
182 Nevins of Childs, Kansas; sold a six months old to Col. Larrabee of Portland, Oregon, for $1,000.00; and sold a calf to Mr. Vorhees of Raton (?), New Mexico, last spring for $1,000.00. The only bulls we ever bought were calves or young bulls. This present bull, we bought his dam and raised him. The Golden Crown bull was the highest priced bull we bought. Golden Crown that we bought with these four was the highest price we ever paid for a bull I guess. I think Lavinia was fifteen months old probably. The pedigree will show. We had owned her from June 20th until she was killed in the railroad wreck. We bought her dam. She was just a little calf. We gave $850.00 I think for her dam with the little calf. That included Lavinia. I think the dam was probably a six or eight year old cow. I think $850.00 is the price. We raised Royal Crown, Golden Beauty, Golden Acorn and Golden Thistle. We did not buy the original Harriman herd as a herd. I proposed to my brother and his son, knowing his father, my brother, wanted to close out and come to Texas, my older brother, Dr. Harriman—and there was another brother sort of associated with him and they were handling cattle under the firm name of Harriman Bros.—and I proposed to Bert, my partner now, if he would buy his father out and make a sale of the cheaper cattle that I would go in with him and make a specialty of Scotch cattle and show cattle. That was four years ago so that it is pretty near a distinct and separate heard now. However, these three cows were topped out of the old herd. We took these three cows out of the whole herd. They were the very best cows in the herd. They were the only three we kept. I think it was in the spring of 1904 that we went into business. This was 1907. I could not state positively what those cows were taken at when we went in, but my recollection is it was $200.00 apiece. I can say in this way that after three years they had increased in value to the
183 figures that I have put on them here. We had bred them to a high class bull, Golden Crown, and by his service they had produced show cattle, very valuable show cattle. We sold one calf at Kansas City for $700.00 out of Roan Osa and we went to Texas and won championship at San Antonio. That makes her a valuable cow. She would be much more valuable at eight years old after producing a show animal than she would be at four years old before she produced. We were taking her to Enid to be sold on the block. I went on to these sales that year and conducted the sales. Our cattle were killed. They didn't get there. We didn't sell any that year. I conducted the sale. I mean that I was auctioneer. I couldn't give the highest price at which I cried off any animal there. I have made two hundred sales since then. I remember that there was a little Scotch yearling heifer that came out of our herd that Mr. McAllister sold there that brought $400.00. I think that was about the top for females. I think they sold a bull there for $400.00 or $500.00. I have sold a good many cattle

since and it would be hard to remember. It would be a guess as to what the average price was at which those cattle were sold that year at that sale—probably $125.00 to $140.00. I account for them selling at that price from just my recollection of the general character and average of the sale. I had had some experience at these various sales. I am the crier of a great many. I have made most of the Oklahoma sales. We were taking these cattle there to be cried off at the sale at Enid. I think they claim about thirty thousand people at Enid now. It is growing fast. It was probably twenty thousand then, but we don't sell cattle in the town. The country people buy the cattle. The cattle go to the country. I should think it had about twenty thousand inhabitants
184 in 1907.

Redirect examination by Judge WOLFE:

I mentioned the Tebo Lawn cattle. Tebo was the name of the herd. Col. Casey owned the herd. At his death we dispersed them at auction in Kansas City. There were seven head in the herd that sold for an average of $1900.00. That made $13,300 for the seven. The bull Choice Goods was sold for $5500.00. I haven't figured out what the others sold for. I have the herdsman's book in my pocket, the prices they each brought.

We sold Mr. Joe Green of Gregory, Texas, two bulls for $1500.00, both of them calves; Mr. Combs at Yukon, Oklahoma, a ten months old bull for $1,000.00; Mr. L. H. Larrabee of Portland, Oregon, a six months bulls calf for $1,000.00; Mr. C. S. Nevins, Childs, Kansas, a young yearling bull Searchligh for $1,000.00; and Mr. Vorhees of Raton, New Mexico, a calf for $1,000.00. He is a lawyer. We did not take his note for it. He had the money and paid for it. That young bull we showed at Oklahoma City we sold for $850.00 in 1906. One of the bulls we sold to Joe Green was about eight or nine months old and the other one was a yearling. He was out of Roan Osa and we sold him at auction at the royal sale at Kansas City; got $700.00 for him and $800.00 for the other one. The bull we sold to Mr. Combs in Oklahoma I think was ten months old. The one we sold to Mr. Larrabee in Oregon was six months old. The one we sold to Mr. Nevins in Kansas was probably fifteen months old. The one we sold to Mr. Vorhees in New Mexico was about eleven months old. The one sold at the Oklahoma auction was a yearling.

185 Judge Head asked me some questions about whether the premiums we received in exhibiting this stock would pay for feeding them and expenses incident to their exhibition. In taking care of such cattle as these, whether you show them or not we are at some expense in keeping them. We don't figure that the premiums we get in exhibiting and show- is the profit; that is not the main profit. That goes towards paying the expenses. It helps to sell the cattle and attracts people to ou- herd; makes buyers for us. There is where the profit is in showing them. We have people to come to where our farm is, our home, and buy there at private sale.

They take them as fast as we can raise them. I spoke of some cattle being sold in Oklahoma at an average of from $125.00 to $140.00. The majority of those cattle were native cattle entered by the younger breeders. They were not high class cattle or in good saleable condition. They were thin. Those cattle that are put upon the block at the sales and sold are not usually a man's best cattle. Sometimes at Kansas City at our big Royal Sale we sometimes put in some of our good cattle, but at most of the sales the cattle that we try to sell are not our best cattle. They are not our top cattle.

Recross-examination by Judge HEAD:

W. P. Harriman & Son didn't make a sale there at Bunceton in 1903. They had a few cattle entered in a combination sale. I think I made the sale. I have made all the Bunceton sales. I think W. P. Harned sold some there; also F. M. Marshall, W. H H. Stephens & Son, J. M. Freeman, W. P. Harriman & Son, Geo. W. Mellor, W. F. & G. H. Steigleder, G. A. Betteridge, A. A.
186 Wallace, C. E. Leonard & Son, S. W. Roberts and C. P. Tutt.

I couldn't give the highest price of any animal that was sold at this sale by any one of these parties. That has been four years ago. I don't remember whether any one went as high as $200.00 or not. I expect some of them wen- as low as $50.00. Some of them were not worth it. I doubt if any of them were worth over $200.00. They are not all breeders right around there. Some of them are breeders. Some of them couldn't be classed as breeders. I can't at this time give the number that each sold. I remember that Harriman & Son sold a few there. I don't know anything about Mt. Vernon Bell, one year old. The farm's name is Mt. Vernon Park; have a great many cattle of that name. Mt. Vernon Bell one year, sire Ravenswood Admiral, might be worth $40.00 and might be worth $400.00; depends on the individuality. I don't remember her at all. I don't remember Queen of Mary's 6th, one year, by Ravenswood Admiral 147258. I expect $65.00 would be high for her. My recollection is they were just making a sale to clean up the tail end to the farmers, call the farmers together and distribute them. They get more than they are worth frequently. From her pedigree I expect $100.00 is enough for Edna, cow, four years, sire Good Enough 125269.

Q. Here is a dandy. Scotch Beauty, two years, sire, Lockel 119975. That all means a heap don't it? What would you say for $80.00 for that beauty?

A. I don't say. I don't know.

Q. Now Ravenswood Admiral himself, 147258, four years, sire Baron Flower 114352?

A. Are you quoting these as W. P. Harriman & Son's cattle?

Q. Yes?

A. I don't think they ever owned any such animal.

187 Q. Geo. W. Conner purchaser, Booneville, Missouri?

A. That was an animal out of Mr. Leonard's herd.

I think Mr. Leonard is one of the witnesses whose deposition we

read. I couldn't tell what to say about $90.00 for Ravenswood Admiral at all without seeing the bull. Leonard, whose deposition was read, is a banker. His is not the bank I do business with. He is president of the Center National Bank of Boonesville. I live at Bunceton. The Harriman Bros. banking business is at Bunceton.

The breeders sell a great many cattle at the sales and privately. The Fort Worth sales and Oklahoma sales help to fix the values of the class of cattle sold. That is the market, but we don't sell many show cattle, high class cattle, in those sales. These we were taking there to be sold were the cheaper end of our herd. We raise cattle to sell you know; have to sell them to keep going; have to get some money. That is the reason we were taking them there to be sold.

Redirect examination by Judge WOLFE:

Bunceton is a place of about eight hundred inhabitants. We have got one branch railroad there. We have a train on it that they call the tri-weekly—go down one week and try to get back the next. There are no steamboats plying down by Bunceton; no other public conveyance or anything. A man couldn't go in there and attend a sale and get out the same day. The train gets into Bunceton about 12:00 o'clock and returns 2:30 or 3:00 o'clock.

Those gentlemen, Charlie Tutt, etc., are my neighbors and are mighty clever fellows: They are young breeders in a way, but they never bought any high priced cattle and never put much
188 money into it. Of course they are doing the best they can in a cheap sort of way. Their business is a little of both farming and stock raising. A good farmer in our country is a stock breeder. They go together. I know of breeders of high grade cattle that would have offered them for sale at a place like Bunceton was. We have had some elegant sales at Bunceton, public sales; I bought this cow there, but it wasn't the kind Judge Head was talking about. They have sales and sales.

Recross-examination by Judge HEAD:

W. P. Harriman & Son were some of the small farmers that I spoke about. C. E. Leonard is a very large farmer. He was a cattle man. S. W. Roberts is a cattle breeder and farmer. Betteridge is a farmer and breeder. We did not read his deposition yesterday. There are two Betteridges. One of them has this herd of Scotch cattle, W. A. Betteridge and Mr. Allen Betteridge is the man who sold at Bunceton. G. W. Miller is just a young breeder with a few cattle. Mr. F. M. Marshall at that time had some right good cattle, but they were Bates cattle; not Scotch. He never did own many Scotch cattle. I don't cast any slur at the Bates cattle. They are good cattle. We have got some Bates cattle in these. I didn't mean they were not good. They are not high priced; can't sell them high. There is not very much of it mixed up with these. Some of these Scotch topped animals have a few Bates crossed in them. I would have to dissect the pedigree to pick out the one that is Bates of this outfit, I believe. I couldn't call it out from my recollection. I think

the Fennel Duchess Thistlewood cow is on a Bates foundation. Butterfly may have some. That sounds like an American pedigree. I did not say that the Bates would not do. Mr. Harned is one
189 of the oldest breeders we have got. He is a very substantial and reliable breeder. All of those men lived there around Bunceton.

I don't know that I can catch that tri-weekly train to go back on it.

Redirect examination by Judge WOLFE:

This Bates blood I spoke of is not Scotch blood. That is English blood. Mr. Bates was an English breeder and Mr. Cruickshanks and Mr. Marr and Mr. Duffy were all Scotch breeders.

Recross-examination by Judge HEAD:

Q. I wish you would look and see what sale that refers to. I haven't got the paper. You can probably identify it. It is January 27th, 1905. It is a sale at which you all sold Scottish Crown to G. H. Giller, White Hall?

A. I think it is a sale we made at St. Louis probably four or five years ago.

It couldn't be 1905. Those figures are put there with a pencil. This St. Louis sale was four years ago. I made the sale. I remember the sale. I think it was the St. Louis sale. I remember the bull Scottish Crown 226267 very well. I think it was $250.00 that he brought. I won't be positive about it. It has been four years ago. It was the to- of the sale. My recollection is it was $250.00 or in the neighborhood of $250.00. Scotland's Crown, the sire of that bull, was a young bull that Mr. Littrell paid Mr. Dustin $800.00 for when he was a calf, He was for a number of years Mr. Littrell's herd bull.

190 Q. At the same sale—Osa's Queen, red, calved Oct. 27th, 1900; bred by J. J. Littrell and owned by Harriman Bros. by Scotland's Crown, dam Osa; sold to W. H. Glassey. Now what kin was she to Roan Osa?

A. She was of the same family.

She was not a full sister, by the same bull and out of the same cow. Osa's Queen was by Scotland's Crown. Roan Osa was sired by Prince Rupert; same dam though. I think that animal brought $150.00. I think that was four years ago; be four years this spring probably. This is February and the sale was in January 1905; about four years ago. That sale was at St. Louis.

I couldn't tell what Brampton Butterfly, consigned by Harriman Bros., brought. I don't remember.

I think that was considered a very satisfactory sale for the cattle. That is my recollection of it. I expect I did give to the Reporter this statement: "I consider the sale today the best of the week." The rest of the sales had been Herefords and Polled Angus and they sold not nearly so good as these. The Herefords and Polled Angus didn't sell for as much as these. I don't remember what the average

of these shorthorns was. I remember there were a great many cheap cattle in the sale. I don't remember whether it is correct or not that eighteen cows sold for $1920.00 and averaged $106.25. I don't remember whether it is correct or not that thirteen bulls sold for $1242.50, aberaging $95.58, but I expect it is. I guess that is a very accurate account. My recollection is that the few cattle we sold there at St. Louis was the clean-up of the old W. P. Harriman & Son herd, the cattle mentioned, with the exception possibly of that young bull. I remember buying him from Mr. Littrell when he was a calf and we sold him at that time in the sale. He was the best bull in the
191 sale; but we didn't breed him; he was Mr. Littrell's breed. He was the best one at the sale, topped the sale, and my recollection is he brought $250.00.

Redirect examination by Judge WOLFE:

Considering the quality of the cattle offered at that sale I thought they sold well. I seem to have said there that they sold mighty well. I say now that is what I thought about it. That is my recollection of the sale. We didn't sell any cattle there at that sale that we had bred ourselves. Osa's Queen was probably out of Roan Osa, but didn't belong to our herd.

Plaintiff Rests.

W. F. NORTON, being duly sworn and introduced as a witness by Defendant, testified as follows:

Direct examination by Mr. H. W. HEAD:

My name is W. F. Norton. My present occupation is that of a freight conductor. It was the same in January 1907. I was running the train that was wrecked near Deerfield. I was conductor on that train. I took charge of that train at Sedalia. That is about a hundred miles from Deerfield. Sedalia is just a hundred miles east of Deerfield. I have a record here showing the cars in that train. I had a car in that train with live stock in it. Just had one car with live stock. I have got a record of it as a car of cattle billed
192 in 51476 P. M. That is all that my record shows about the car. I picked that car up at Sedalia. There was a man on my train in charge of the stock. I have learned since who the man was that was in charge of it. It was Mr. Minton. This was the only car of stock in my train. I first had connenection with that car of stock at Sedalia. I had nothing to do with that car before it reached Sedalia. I picked up the car at Sedalia.

I was riding on the engine at the time the wreck occurred. Leaving Nevada we always have work to do at Fort Scott. Fort Scott is twenty miles from Nevada. Deerfield is ten miles from Nevada. The wreck occurred about three-quarters of a mile from Deerfield. I was on the engine to keep from having to walk over the train to the head end at Fort Scott, as our work is always on the head end. We had thirty-five cars in that train; had twenty-four loads and eleven empties. I can't tell from my record how the air was on

that train; not on all cars. My record doesn't show that. I don't know how many cars of that train the air was working on. The car inspectors keep that record and know. I will give a list of the cars in my train, beginning at the engine, in the order in which they were at the time they were wrecked. They were the M. K & T. 3367, E. & T. H. 12382, C. C. C. C. 785, C. B. & Q. 39258, C. B. & Q. 96879, St. I. M. & S. 19731, G. T. 60063, G. T. 62020, D. L. & W. 29650, Missouri Pacific 33950, St. L. I. M. & S. 18302, C. B. & Q. 39063, M. K. & T. 7434, P. M. 51476, M. D. T. 13498, Big Four 46150, C. & A. 7158, M. K. & T. 11784, Missouri Pacific 14035, P. R. R. 275471, M. K. & T. 20258, M. K. & T. 24376, C. & E. I. 10315, M. K. & T. 1871, M. K. & T. 50107, G. G. W. 1761, M. K. & T. 21262, S. W. & S. 4375, S. A. & A. P. 4036, M. K. & T. 34334, M. K. & T. 3605, M. K. & T. 3706, U. T. L. 4341, U. T. L. 4729, U. P. 81221, and then the caboose M. K. & T. 92. The car
193 of stock was the fifteenth car from the head end. I do not make any inspection and did not make any inspection of this train at any time. I don't in any way inspect the train. I only look over it to take the numbers and seals. I don't look at the brakes and machinery. In leaving Nevada I was riding on the engine. After the engine passed over the bridge at Deerfield, I felt a slight resistance and that is the first I knew of the wreck. I did not notice anything in passing over the bridge, when the engine went over the bridge. It was after the engine had passed through. We are accustomed to those jars. We noticed the air *guage* on the engine thinking the air had set. We noticed the *guage* and the air on the *guage* was all right and just about that time we felt a jar, jerk back, and then we all got off the engine and looked back and saw the cars in the creek and the bridge broken down. After that we went back towards the wreck, towards the bridge, and found the bridge partly torn down and thirteen car- in the wreck mashed up. Ten cars passed over the bridge and were over the bridge. Ten cars were over the bridge. There were thirteen cars on the far side of the bridge and not in the creek. The car of stock was among those that went down in the wreck. I made an inspection or examination there to ascertain what caused the wreck. We went back and looked over the track and saw that it was torn up badly in several places. Then went back farther and saw where the wheel had first left the rail; saw where the trucks of some of the cars, the wheels, had first left the rails. I am not sure as to the distance, but I think that was about twelve or fifteen rail lengths from the bridge. A rail length is thirty-three feet. Twelve or fifteen rail lengths east of the bridge, that is, before the train got to the bridge we
194 found where the wheels had left the rails. We found something farther back. We went back farther and found marks on the ties. The marks indicated as though something was dragging on the train and sticking in the ties occasionally. Some they hit and some they missed. Occasionally we would see marks as though something was dragging and striking the ties occasionally. I don't remember how far back that was. After I saw the track was all right, I didn't inspect it any further. I did not find any defects

in the track except what I have mentioned. At that particular place the road bed was first class. It was ballasted; rock ballast. I did not find any other facts indicating what caused the wreck. I did not find any facts indicating how the bridge happened to be struck. I couldn't say. I didn't see the cars when they knocked the bridge down. Of course we figured that the cars knocked the bridge down. I figured that the cars knocked the bridge down by being off the track and the trucks of the car sluing and when they reached the end of the bridge the trucks, being in a slued condition, went over the side rail and into the bridge. The track was straight where the wreck occurred; just leaving the point of the curve. Up to the bridge the track was straight. There was a curve just north of there; just go around a curve down to the bridge and it straightens out across the bridge. Going south there is a slight curve to the left before you get to the bridge. The curve is to the left and the outside of the curve is to the right. We could tell from the indications that the truck went to the left side of the track. We were going south and the truck indicated that when it left the track it went to the inside of the curve. The condition of the marks on the ties indicated that the trucks went to the left. The marks on the ties
195 showed that the trucks had gone off to the left. The trucks passed off to the left hand side; to the inside of the curve. That would be to the east side. As indicated by the marks on the ties, those trucks went out to about middle ways of the track, not quite. The guard rails extended not quite a car length from off the abutment of the bridge on either side. I couldn't tel- which wheel struck the guard rail; couldn't tell anything about that. The guard rail is supposed to throw the wheel to the main rail if it strikes it properly. I couldn't say whether this struck it in that way or not. That would be guess work with me if I would say that it did, but we figured that it struck it sideways. It was all torn up so I couldn't tell where it struck the guard rail; couldn't tell a thing about that. The wheel marks indicated that the wheels had left the track so that the outside wheel was about the center of the track. Trucks can slue without throwing the car outside of the rail, but they slide along inside of the track and the coupling of the car holds the car in line with the others. I concluded from the conditions of the ties and track the way it was torn up, that when the truck first left the rail that it went to the center of the track and then striking the ties caused it to slue. It slued far enough to show that it was about the center of the track and then slid—was pulled along—almost sideways to the bridge. I just figured then when it reached the guard rail, instead of straightening up, it went over the guard rail and that threw the car into the side of the bridge. I couldn't say what car or cars slued out and struck the bridge abutment and caused the wreck. The last car that went over the bridge in safety was Missouri Pacific Car No. 33950. That car was not torn up very bad. The trucks were out from under it and it rolled down the bank. The trucks were out from under it. They were with the car, but
196 they were torn loose from the car. The car was just torn up from sliding down the bank; the roof of the car. I didn't

make a very close inspection of that. I don't remember whether the trucks of that car were across the bridge or not. I don't remember now whether I saw the trucks of that car anywhere or not. I r-member taking the numbers of the cars and I made a record in my book that that was the last car that went over the bridge. The car ahead of that in the train was all right, right side up, but was off the track. It wasn't torn up in any way. I couldn't say which car went in the creek first. I can tell the car that was next to that one. I don't know whether that went in first or not. The car next to it was C. B. & Q. 39063. That was the next car in regular order in my train, C. B. & Q. 39063. The car last over the bridge was St. Louis, Iron Mountain & Southern 18302. That was next to C. B. & Q. 33950. I want to get that right now. 18302 St. Louis, Iron Mountain & Southern was south of the bridge down the bank. That wasn't the tenth car in the train from the head end. The tenth car from the head end was 33950 Missouri Pacific. I said ten cars passed over the bridge. That is correct. The tenth car was 33950 Missouri Pacific, but my record shows that 18302 St. Louis, Iron Mountain & Southern was over the bridge, but down the bank. That is my recollection. That makes eleven cars in all that went over the bridge, but one was thrown down the bank. I made a record of thirteen cars wrecked. That included the St. Louis, Iron Mountain & Southern 18302, but that was ove- the bridge. There were ten cars that were on the track beside M. P. 33950. That car was not hurt in any way except it was off the track. It is my recollection that St. Louis, Iron Mountain & Southern went over the bridge, but went off the track and rolled down the embankment. The next car to that Iron Mountain & Southern car was C. B. & Q. 39063.
197 That would be the twelfth car in the train. That car was among those that went down into the river, the twelve cars that piled up in the river. The Iron Mountain car was not attached to and still coupled to the Missouri Pacific car 33950 after the wreck. That was not coupled to the Missouri Pacific car. It was not coupled to any other car neither before nor behind after the wreck. It was down the bank. The Missouri Pacific car was not coupled to the car ahead of it after the wreck. The Missouri Pacific car 33950 was uncoupled too. It was off the track but standing upright. It is my recollection that the car ahead of it was coupled. I didn't make any note of that, but that is my recollection that Missouri Pacific 33950 was south of the bridge, but off the track. I am not sure about whether it was uncoupled at both ends or not. I think it was with the head end of the train, but off the track I wouldn't be sure about that. I did not examine the coupling apparatus of any of those cars.

Prior to the slight jar or jolt I felt of the train and then the quick application of the air I had not noticed anything at all wrong or observed anything wrong about the equipment of the train. There was not anything about its movement to indicate anything wrong. I don't know how far beyond the bridge we were when I first noticed anything at all. We had just passed through the bridge. We were going about twenty-five miles an hour. I have had five years' ex-

perience as conductor. From my experience as conductor that was not an unusual or unreasonable rate of speed over that piece of track at that place. I didn't consider it a dangerous rate of speed in any way at that place. I would consider that the track at that place is good for any rate of speed. I would consider that piece of track good for any rate of speed that trains make.

198 Brake beams or brake shoes sometimes get down on trains out on a run when the train was apparently in good condition when leaving the last station where it was inspected.

The length of that bridge was one hundred and fifty-two feet I think.

We call Pilot Grove north of Sedalia. I think the distance is twenty-three miles from Pilot Grove to Sedalia.

I got all this train in Sedalia. I had the Iron Mountain car 18302, which was the last car over the bridge, out of New Franklin into Sedalia on January 30th. That was the day before the wreck. I brought that car into Sedalia from New Franklin on January 30th. I got into Sedalia at 10:30 p. m. on the 30th and left Sedalia at 5:20 on the morning of the 31st. I brought that car from New Franklin to Sedalia. That is thirty-nine miles. Then from Sedalia to the place of the wreck was one hundred miles. I first picked up C. B. & Q. 39063 at New Franklin, and carried it to Sedalia the same as the Iron Mountain car. I did not have those cars in any train into New Franklin. The first time at this time that I picked up those cars was at New Franklin. I did not have any trouble with either of those cars at any time from New Franklin to the place of the wreck. I have no record of anything being the matter with either of those cars on that run. While those cars were in my charge, if there were any defects that showed while running that were discovered, I would go and see them. A great many things happen on a train such as air sticking or brake beams coming down or broken knuckles or broken knuckle pins. If anything like that occurs between stations on my run, I know of it and repair it if it is discovered. Nothing of that kind was observed on either one of those cars from New Franklin to the wreck. They had inspectors and repairers at Sedalia, between New Franklin and the place

199 of the wreck. They had inspectors and repairers at Sedalia. Those cars were at Sedalia from 10:30 p. m. until 5:20 a. m.

Cross-examination by Judge WOLFE:

I have testified that I was the conductor in charge of this train. I left Sedalia at 5:20 a. m., the morning of the 31st. The wreck was at one o'clock in the afternoon. The stream that the bridge was over where the wreck occurred is called Drywood Creek. It is never very large only when they have very heavy rains. The banks are not precipitous. I never have noticed particularly whether the banks are straight up and down practically or a gradual sloping off from the bed of the stream. I couldn't say. I don't know. I have only hearsay as to the length of that bridge. I heard it was 152 feet long. I don't know how wide the bridge was. It was an overhead bridge. It had beams up on either side above the roadbed. It was a high

bridge, overhead bridge. It was constructed so a man could stand on a car and go under it. It would clear you on any car. The north end of that bridge went down. I should judge about half the bridge went in. I don't remember just how that bridge was constructed, whether it was one big long span or whether it was two spans. Just one end of the bridge went down. My recollection of the bridge is that it was one solid span. It was 152 feet from my information. I never measured the bridge. That bridge was on rock abutments. It had two abutments; one at each end. I couldn't say whether the abutments were standing or down after the wreck. Some rails are
thirty-three feet; some thirty. I wouldn't say what the length
200 of those rails were at that time. They have changed the
rails since then I believe; put heavier rails in I think. I am not sure whether they did or not, but the rails we have now are thirty-three feet long. The rails have been changed from Parsons to Sedalia. I wouldn't say whether it was before or since the happening of the accident that they were changed. I am not sure. It is my best impression that it has been done since.

I don't know what the exact distance was from the north end of the bridge to where the first evidence was of the track being torn up. It was about ten or eleven rail lengths I guess; well, twelve or fifteen. I didn't measure it. That is my best recollection. I went back farther than that and examined the road and found something had been dragged for some distance behind north of the point where I first found the track torn up*l* showed marks on the ties and some of the rail. Those were not marks of a car wheel. I went back as far as I saw that the track was in perfect condition and came back. There were marks on the track as far as I went back. I didn't go back any farther than I was satisfied the track was all right. If there were any marks any farther back than that, I don't know. I didn't go back to see. I don't know how far this whatever it was was down and dragging. I don't remember the distance that I went back. I did not go a quarte- of a mile. I don't think I went that far.

This train that I had was made up in Sedalia. It consisted of thirty-six cars and the caboose out of Sedalia. I had set out one before the happening of the accident. I had thirty-six cars and the caboose when I left Sedalia. There were twenty-four loads and
twelve empties. The loads were mixed in the train. I can
201 refer to my book and tell whether 33950 M. P. and 18302
St. Louis, Iron Mountain & Southern and C. B. & Q. 39063 were loads or not. M. P. 33950 was a load and 18302 and 39063 were loads. They were all three loaded cars. Those were the cars Mr. Head examined me about. 33950 was loaded with merchandise, 18302 was loaded with merchandise and 39063 was loaded with pickles. The car containing the cattle was the fifteenth car from the head end of the train.

I said before the happening of the accident I felt something and looked at the air *gua*ge to see if the air had gone off and it had not at that instant. The air stopped the engine. The train parted. The air brake appliance on the train was such that whenever the

train line was cut or broken, that in and of itself set the air in emergency. The air on a train is set automatically whenever the train line parts without any of the angle cocks being cut out. The emergency application is the most powerful application of the air. An engineer, through his air valve on his engine, can at any instant set the air in emergency on the train. The emergency is never used except in case of great danger—that is my understanding of it. If an engineer running down the track should find a bridge or culvert on fire or that had been washed out or an open switch or any person on the track liable to be run over, it would be proper then for him to set the air in emergency. That is, through the manipulation of the brake valve in the cab he would give the full force of braking power both on the engine and on all cars in the train having air at the same time. That is the quickest stop that can be made.

Q. A heavy train in motion is stopped less readily tha- a light train isn't it?

A. You mean it won't stop as quick?

202 Q. The momentum of a heavy train—it takes longer for an application of the air to overcome the momentum of a heavy train than it does the momentum of a light train?

A. I am not authority enough on air to answer that question. My engineer is not here. I have been railroading about sixteen years.

Q. Well, don't you know as a matter of fact that a heavy object set in motion at a given rate of speed, it takes a longer time or more force, more power, to stop it than it would a lighter object going at the same rate of speed; whether you ever railroaded or not, don't you know that?

A. I have heard so many arguments on that, I would be unable to decide. Some claim they can stop a heavy train quicker than they can a light train.

Engineers have claimed that. I have heard engineers on the Katy arguing that. My understanding is that freight cars average between forty to forty-two feet in length from draw bar to draw bar. That is, including the slack and space between the ends of the cars, it would be about forty to forty-two feet. That is my understanding of it. I don't know that as a fact. An ordinary car today is about thirty-six feet; just the car itself. Then there is the draw bar and space and slack which must naturally exist between the cars and make it something in the neighborhood of forty to forty-two feet.

When my train was made up at Sedalia it was composed of cars that had come in there and which were to be taken south. Those cars had come in there in various trains. I have testified about hauling some of them in there the day before. Some of the cars in my train were brought in on other trains than the one I brought in the day before. Some cars might have been in the yards there at

203 Sedalia for days. The yard men at Sedalia made up my train and the other men and I who were to take that train out were called to go out that day. They had inspectors at Sedalia. I did not inspect this train in Sedalia. Personally I don't know whether

it was inspected or not. I don't know the condition of the brakes on the train or how many cars of air we had. The brakemen notify the engineer as soon as they couple the engine on to the train just how many brakes are working and how many are not, but they never mention that fact to me unless they just happen to think of it. That is their duty, but whether they do that or not I don't know. The engineer is supposed to get up in his cab and make an application of the air and the brakemen are supposed to traverse the sides of the cars to see whether or not the air is working properly on the train. I was not there to see that they did that. I don't know personally that they examined it, but they are not allowed to leave a terminal unless they do that. That is the rule. They could leave without it. It would not be impossible. They have inspectors at Nevada and car repairers. They work for the Union Pacific and the M., K. & T. From Sedalia to the point where the accident happened is about one hundred miles. The distance from Sedalia to Deerfield is exactly one hundred miles according to the station numbers; according to the station numbers that we go by. The conductor is supposed to ride on any part of the train that his duty requires. As a rule he rides in the caboose, but his place is anywhere on the train. A conductor has charge of the train he is running, and ordinarily the engine men look to the caboose for signals, and the conductor is the man to see that the signals are given if he doesn't give them himself. Arriving, departing and stopping, his signal governs the train. I had two brakemen on this train. They were Mr. Greenstreet and Mr. Phelan.

204 Mr. Phelan was the head brakeman. Under the rules, his position was on the head end of the train. Mr. Greenstreet was rear brakeman and his position was on the rear end. Ordinarily the head man might ride in the cab of the engine and the rear man might ride in the caboose. Mr. Greenstreet was on the rear of the train at the time of the happening of this accident and Mr. Phelan was on the engine. I was on the engine on the left hand side of the cab. I was in the cab. I made no examination of my train after leaving Sedalia. I made no examination of it only just passing it occasionally. I don't say that there is no duty devolved upon me as conductor of the train to keep a lookout at my train running along the road. It is my duty. I am supposed, as much as any other member of the crew, to keep a lookout to see if my train should part. And I am supposed to look out and see if there is any smoke coming from a hot box, or fire, blaze, if I am in a position where I can. Consistent with all my other duties, I am supposed to discover a hot box on my train. If there is any smoke arising from a hot box or any flame coming from a hot box, I am supposed to discover it. That is my duty consistent with my other duties. If I should run my train and burn off an axle I would be held responsible by the company. The company would hold me responsible if a hot box should burn off a bearing or burn out a bearing even though I was not at fault. I am supposed to see that the brakemen take care of those things. The brakemen are under my control. When I tell them to go, they are supposed to go, and when I tell them to come, they are supposed to come, and they all

have their duties to perform and I am to see that they perform them. I have the general overseeing of the train and running of the train and there are times on the train when the brakemen have more time for those matters than I have. As a general proposition
205 they have more time than I have for an examination of the train, looking after the train and discovering anything that is going wrong in the train. Where trains are stopping at stations all that time belongs to them to perform that duty. I don't say that it is not the duty of the conductor and brakemen to keep a lookout on the train only when they stop at stations. It is their duty to keep a lookout at all times consistent with the circumstances.

Coming down from Sedalia on this occasion we had some hot boxes. We discovered them by smelling the smoke from them. If I remember correctly I think it was two hot boxes that we had. I don't remember the exact points on the road where they were, but I can tell about where they were. I think the first one was discovered between Calhoun and Lewis. We stopped on its account on top of the hill just south of Calhoun; stopped out on the main line. That was our duty. We treated that box there; put in a brass. We were delayed there about twenty minutes on that account. I think the next hot box was at Ladue. I am not sure about that. We stopped out on the main line on account of that. We cooled it off and repacked it. We did cool the first one off. It was necessary to put in a brass in the first one, because the babbitt was all burned out of it. We didn't put in a brass in the last one because according to our judgment it didn't need a brass. The first one the brass was so burned that we thought it necessary to put in a new one and did so. The last one, we merely cooled it off. We were north of Nevada when we treated this second hot box.

I don't know hc the engine was steaming on this trip. I never heard any complaints of the engine not steaming. We were not making very good time. We were running sort of slow. We were not behind time. We didn't have any time. We were an
206 extra. We had no time except as it was given to us by the despatcher. This accident happened about one o'clock in the afternoon; almost one o'clock. We left Sedalia at 5:20 in the morning. We had gone a little short of a hundred miles. It was a hundred miles from Sedalia to Deerfield. The accident happened north of Deerfield I should judge a half or three-quarters of a mile. We were nearly a hundred miles out from Sedalia.

My record shows that there were ten cars over the bridge. I wouldn't be positive about the St. Louis & Iron Mountain car 18302. When the wreck took place I simply drew a line through my book as to the cars south of the bridge. The cars were wrecked in such a manner it wasn't necessary for me to make any further report on them. It is my recollection that 18302 St. Louis & Iron Mountain was south of the bridge, but wholly detached from my train and rolled down the bank and the trucks were out from under that. That is my recollection of that car. I couldn't say how far south of the bridge that car was. I don't know whether it was as far as across the courtroom here or not. It wasn't very far over the

bridge,—I should judge a car length or more over the bridge down the bank. The north end of the cars yet attached to the engine was about ten car lengths from the south end of the bridge when we stopped.

I have testified that on this bridge there were some guard rails. The guard rails were laid parallel with the main line rails and about three inches on the inside of them and the ends at either end brought together in a V shape across the ends of the bridge. I don't know the distance of the rails from one end to the other. The object of
207 the guard rail over a bridge is to hold the wheels if they become derailed as close to the main line rail as it can until it crosses the bridge, so it wouldn't strike the side of the bridge or go off. If the car was derailed there before it reached the bridge, the only way in which it could have gone off the bridge or into the side of the superstructure of the bridge was that it should and must have mounted this guard rail and instead of being carried around, the flange must have gone over it. It is my opinion it must have gone over. I don't know whether it couldn't happen unless it did or not. It is hard to say what they could do. The object of the guard rails is, as I said, to keep the wheels, if they should be derailed, running parallel with the rail and hold it on the inside. I couldn't say as to whether it is bound to have mounted that guard rail in order to have gone into the side of the bridge or off the bridge. Of course something could have torn up the guard rails before that reached the bridge. Assuming that the car and the guard rail was in proper position, if the guard rail had performed the office for which it was intended, the car was bound to have stayed on the bridge and couldn't have gone into the side of the bridge as long as it was held in position by the guard rail. That is the object of the guard rail. If the guard rail was torn up before the train came to it, I don't know whether parties on the train could have seen that or not. Our indications as to a derailed car are something dragging, just something—ballast or dust flying—indicates something wrong with the underneath part of the train and a person on the train couldn't see whether it was guard rails or something dragging. If anything had been dragging so as to have torn up things, marked up
208 things and dug into the ballast, it is bound to have thrown up dirt and dust with the train running even twenty-five miles an hour, and if one had seen it he would have known there was something wrong. Of course if he didn't see it, he wouldn't have known it. It is not the engineer's duty, consistent with his other duties, to keep a lookout from his engine back along the train line. The engineer's duties require him to keep a lookout ahead all the time. He looks back for the signals from the caboose of course. If there is a rule to the effect that he must keep a lookout back over the train to see whether the train has parted, I don't know it. I am not an engineer. It is his first duty to keep a lookout ahead and operate his engine. It is everybody's duty on the train to watch the train. I don't know how far those guard rails extended north and south of the bridge line. They did extend north and also south. I know they extended north and south of the bridge, but I don't know

how far. I could not approximate it. My recollection of the guard rails is that on the north end of the bridge they were torn up when I went back to see. All the track was torn up right at the immediate approach of the bridge. I don't know what shape the guard rails were in. I don't know whether they were twisted or not. I did not examine them to see if anything had struck them, or whether any great force had been applied to any particular place.

Redirect examination by Judge HEAD:

It is the duty of the inspectors at Sedalia to make a thorough inspection of all cars that come in to Sedalia. It is also their duty when a train is made up and put together that they inspect the train and see that the air is all right with the train after the engine is put on the train. After leaving the terminal, it then becomes the duty of the train crew to watch the train as carefully as they can and to inspect it at all stops. It is the duty of the car re-
209 pairers at Nevada when we pull our train down into Nevada that they should inspect the train. If we don't pull our train down into Nevada but stop on what we call the long track just north of there, it is then still the duty of the train men to look over the train. I said it was the duty of the car inspectors at Sedalia to thoroughly inspect all cars that came into Sedalia; when they arrive at Sedalia. That includes all cars that go out in a train. Those cars that come in there are the ones that go in the trains that go out as a rule. If a car was started at Sedalia, if it was loaded there, that car would be inspected. All cars are inspected at Sedalia at some time no matter where they stand; that is, provided they do their duty. I mean that it is the duty to inspect all cars. I don't mean that I know positively they inspect them. I mean it is their duty of course. I believe I said that it was the duty of car inspectors to thoroughly inspect all cars. In making a thorough inspection of a car, they look at all parts of the car. It is their duty to look at all parts of a car, running gear and equipment of all kinds; see if there is any defect about the car, both the running gear and top and the sides. Out on the road it is the duty of the train men to inspect. At stations there are particular ones of the train men who look after the condition of the cars there. They are the brakemen. At stations where they stop sometimes the conductor is getting train orders, sometimes at the office asking for train orders, asking for help to get to another station or perhaps answering messages. If not doing that, he is many times making out reports. The brakemen have many other things to do besides looking after the condition of the cars. It is their duty to set out cars and pick up cars and load stock;
210 sometimes load and unload freight. That is while they are switching and doing their work there. The engineer and fireman always stay with their engine. There was not, within my knowledge, any omission of duty on the part of any one in connection with this train from Sedalia to the time of the accident. If there was, I don't know it.

Recross-examination by Judge WOLFE:

Within my knowledge there was no neglect in the performance of duty by any of those persons with reference to the inspection of this train. Within my knowledge that train was not inspected at Sedalia. Within my knowledge it was not inspected at Nevada either. What I mean to say is that I don't know; that it might have been that those people performed their duties; it might be they did not; I don't know. That is what I mean to say.

In going along the road when the train is running along between stations it is the brakeman's duty to watch the train while it is running, and see if anything shows up wrong. That is the only duty they have between stations where the train is proceeding along the road; look out for anything that might show up that indicated danger in any of the machinery about the train.

SAMUEL BOWSER testified for Defendant by Deposition as follows:

Answers to Direct Interrogatories.

My name is Samuel Bowser. My home is at Sedalia, Missouri.
I am in business at Mexico at present, the Republic of Mexico,
211 Old Mexico. I expect to leave shortly for Mexico. I am
home on a visit now. I expect to leave Thursday morning of this week. I don't expect to be back during October and November next.

Prior to going to Mexico recently, I was a locomotive engineer for the M. K. & T. Ry. Co. I first commenced running an engine in 1893, as engineer. I had had an experience as fireman on an engine of about six years before that, immediately preceding my becoming an engineer. I left for Mexico on the 18th of December, 1907. I had been engaged continuously as a locomotive engineer up to that time. I was a locomotive engineer on the M. K. & T. Railway, but not during all the time I was an engineer. I was engaged in the same business on the Mobile & Ohio for a short period of time. Altogether I operated an engine on the M. K. & T. about fourteen years. I ran principally over what is known as the Sedalia Division or third district, from Sedalia, Missouri, to Parsons, Kansas. I was well acquainted with that part of the M. K. & T. Railway. I passed over that road, while I was running, nearly every day. I remember of a wreck that occurred at Big Drywood Creek or bridge. That occurred on the 31st day of January, 1907. It occurred about one o'clock in the afternoon. That occurred at Big Drywood Creek at the bridge, the bridge over Big Drywood; on Big Drywood and one mile north of Deerfield station.

I was in charge of the engine pulling that train. My fireman was Fireman Roundtree. I had known him about a year as a fireman. He was an experienced fireman. William Norton was the conductor of that train. He is an extra conductor. I mean he was running extra at that time. He is considered one of our best men.

He is very careful. There were two other men in the crew,
212 two brakemen. The head brakeman was Mr. Bob Phelan.
The rear brakeman was Tansey Greenstreet. They were old men on the road, experienced men. They were first class men.

I was familiar with that part of the M. K. & T. Railroa- The track in the neighborhood of the bridge was on heavy ballast and in good condition in every particular, and I think that part along there has always been some of our best track. I said something to Mr. Jackson this morning about that being a race track.

Q. What — you mean by that?

A. Because the track is in perfect condition. You don't have to fear. As we term it in railroading, you can wheel them just as fast as you can run.

It was on a heavy stone ballast. That bridge was in first class condition. It was a heavy steel bridge. I recall that a few years before that, or several years before this accident that a number of bridges were reconstructed to adapt them to heavier rolling stock. This was one of the new heavy steel bridges put in for that purpose. This bridge has been put in since I have been on the road, and after the receivership of the M. K. & T. After the receivership that was one of the new bridges that was put in to take heavy rolling stock. It is a fact that in recent years the rolling stock on railroads has increased very much from what it was in former years and they had to reconstruct bridges to suit them to that heavy rolling stock, and this was one of the new bridges constructed for that purpose. I passed over that bridge and that track nearly every day. I don't remember that I ever received a slow order over that bridge; that that bridge was out of repair at any time.

213 Q. And how was it in regard to receiving any slow orders for that part of the track?

A. None at all.

A slow order is when a bridge is out of repair or the track out of repair. We get what is called a slow order. That signifies that we shall run slow and carefully over such part of the track until it can be repaired. If we don't receive it at a place like that, it indicates that the track is in first class condition, and the road generally, and the bridge also. I don't remember of receiving any slow order for that locality at all.

That was an extra train. I had engine five hundred and sixty. I don't remember just how long I had run that engine, but I had been running that one engine for over two years at that time. I don't know how much longer. I was familiar with that engine in all its details and all its parts. I knew every piece on that engine. I took that train that day from Sedalia, Missouri, starting to go to Parsons. When I took charge of my engine to go out that day I noticed the condition of my engine so as to know whether it was all right. I found the engine all *I*. K. in every particular. I did not notice anything from the time I left Sedalia until the accident occurred to indicate that anything was out of order on the engine; nothing on the engine. From my experience and my knowledge of engines and that engine in particular, and my familiarity with it,

I would have been able to detect if there had been anything out of repair or out of condition. I would have been able to detect the least little jar of a pound or anything wrong with the engine. Although an engine is very noisy, an engineer gets so accustomed to the working of the engine and the certain noises it makes that if anything went wrong he will notice it. You might say he would almost hear a mouse on the engine. Any little thing he would detect, and nothing could happen on the engine but what he
214 would detect it right away. Nothing occurred that day. From my knowledge generally and my experience and observation that day, that engine was in perfect condition in every particular at the time of the wreck. The engine nor anything connected with the engine did not cause that wreck.

I don't examine the cars when they start out. I have nothing to do with that. Over the run from Sedalia to this bridge that train handled what we would term an easy pulling train. I had thirty-six cars in the train. It was a big heavy train. That does not include the caboose. There were thirt- six besides the caboose. It was an easy pulling train, a nice pulling train. The air on that train worked first class. The train responded at once to my manipulation of the engine in stopping and starting. It responded just as soon as you made your application; it took right a hold. It made elegant stops and would stop with ease, and start with ease. I did not notice anything at all from the time I took that train until this wreck occurred to indicate that there was anything out of condition in any of the cars. So far as I could judge from my position on the engine, not only the engine, but all the cars were in perfect condition. Up to the time we got to the bridge there was no incident happened at all that there was anything wrong. Everything went on in the usual way as it should go.

We were running about twenty-five miles an hour. That was a safe speed to run over that part of the track. I could have run sixty miles an hour so far as the safety of the train was concerned and the condition of the track. I mean at that place and under existing conditions. So far as the handling of the train, there was not anything done out of the ordinary course before the wreck occurred which could have caused the wreck. The track is just a slight curve there, a slight curve to the left. Right there by the bridge
215 it is about level. The level track extends nearly a half mile north from the bridge. It is a pretty steep grade for several miles north. That is coming out of the creek bottom. When we went down south towards that bridge, after we went over the top of the hill we shut off steam and let the train roll down. I- would be just about three miles north of the bridge when I shut off steam. Then I did what we call "let her roll": just the gravity carry it down. Certainly I had it under check with the air brakes. I had the train under control with them. If a train rolls faster than we care to have it roll, you can pull the air and steady her down, when you want to make an uniform rate of speed. An ordinary way to run an engine there near to the bridge is to let them *to* drift down the hill and then about the approach of the bridge we begin to work

steam slightly because the track is straight and it doesn't require much power to keep you going, and keep up the stand and have the momentum to go up the hill on the other side. There isn't much hill on the other side. I applied the steam on that occasion in the usual way, what we call hooking up the engine and give her a little bit of steam. My engine went over the bridge that day, went on to and over the bridge. I did not notice anything wrong while my engine was going over the bridge. The first that I discovered anything at all was just after we had got over the bridge about ten car lengths. Then I noticed the air going on suddenly. I did not apply it. That happened by the brake pipe being broken on the train. When I say the brake pipe, I mean the pipe and the hose from car through which the air passes. If that breaks at any point, it sets the brakes. That is what I first noticed, that the brakes were set. Then the train stopped immediately. I was on the engine when
216 the stop occurred. I was south of the bridge. Ten cars were over there with the engine, ten cars coupled on to the engine. The first thing I did—the conductor and the brakeman and fireman jumped off of the engine and ran right back, and I looked at my watch to see how much time we had for number three. Number three was due out of Nevada at 1:05, and so I jumped off the engine and went back and lifted the lever and put a chunk on it to lift her up and run her up to Deerfield to call an engine to hold number three. I didn't know but what everybody might be hurt on the rear end of that train and we couldn't go back to flag the train and I wanted to flag that passenger train, and as soon as I notified the agent to notify Sedalia and Nevada to hold number three if they possibly could get her, I went back and then examined the condition of things. The bridge was not still standing. I found the bridge all knocked down and twelve cars inside the creek banks. There were some cars on the north side. There were thirteen cars left on the north side, and the caboose was back there. I examined to ascertain what could have been the cause of the accident. I examined the track north of the bridge. Coming up to the approach of the bridge the indications were that a car was derailed and that the trucks slued in towards the center of the track, and judging from the looks of those things, when that train came up in contract, that wheel that was slued off the track came up in contact with that guard rail on the bridge, slued it to one side and slued that car right into the bridge, to the side supports, to the uprights there, and consequently the speed of that train and the weight of that train knocked the bridge down, knocked it to one side and knocked it down. It couldn't withstand it. Under the circumstances
217 the entire momentum of that train would come against the point of contract. There were thirty-six cars. There were twenty-four loaded, and ten empties and the caboose and the engine, and running at about twenty-five miles an hour. I haven't any idea now of the weight of that train. I wouldn't know — to estimate it, but there must have been many thousands of tons. Striking the end of that car against the supports of the bridge tore it dow- in the pit and let the cars go down. When I said a while ago that judging

from certain things it seemed that this truck had slued around and struck the guard rail, by "certain things" I meant the center of the track had been gouged out to show that it was something in the center of the track that slued the car off to one side into the bridge. That bridge was provided with guard rails. They are safety rails on a bridge so in case a car would be derailed, that guard rail would keep it from slying to one side and getting off the track and doing this very thing. Those rails are laid clear across the bridge and on each end they come together; they curve together. The idea of that is that if a truck of a car gets off, this will cause it to bear back nearly to its proper position, and prevent it striking the bridge. If a truck went off and retained its proper position under the car and didn't slue around, those guard rails would protect it. That has been done many times. *That has been done many times.* But if it slues around, then the side of the wheel would strike the end of the rail. If it hit the guard rail just on the inside it would bring it right back under the car, but if it hit on the outside, then it can't do anything else but put it off the track. I never heard of that sort of thing occurring before. An ordinary derailment, the guard rail would prevent this sort of accident. This happened to take that particular course at that time. That was the best understanding I could
218 get of the situation. I am satisfied that is the way it happened. So far as I could tell, knowing all the conditions, and from my experience, that accident did not result from the omission of any character in the handling of the train or in providing proper track and bridge for it to run over. I have already stated that the track and rolling stock was in perfect condition, and the bridge also.

(Deposition taken by H. D. Muir, Notary Public, Pettis County, Missouri, on 14th day of September, 1908.)

A. SEDDON, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. HAYDEN HEAD:

My name is A. Seddon. At present I am road master on the Sedalia Division of the M. K. & T. I was road master in January, 1907.

I remember a wreck near Deerfield known as the Deerfield wreck. I went to that wreck. I usually go over the division every day and I was on my way south that morning. I had been north to the north end of my territory and I was coming south and I was on the following train behind the wreck. When I heard of the wreck, I was at Nevada, Missouri, ten miles north of where the wreck occurred. I got there just about one hour after the wreck. I made an inspection or examination of the wreck, of the track, road bed and surrounding circumstances to ascertain the cause of it. Just as soon as I put what men that were there to work, I went back and examined the cause of the wreck. The bridge was all knocked down. The train
219 was coming south and the wreck struck the north end of the bridge and carried that down with the wreck and all the bridge was gone. The bridge seat on the south was still resting on

the cap, but it was down. It was a one span bridge. I couldn't be exact, but I would say that it was about two hundred feet long. I wouldn't be sure. I never measured it. About three hundred feet north of the bridge was a mark where the first car left the rail. It was just coming off the curve, just coming on the straight track to the bridge and the mark showed where the first trucks had left the rail and they went right out on the outside of the ties; that is, the right hand wheels went on the outside and the left hand wheels went on the inside of the track, and they went on in that position and struck the outside of the bridge and that forced the bridge down. I went on up the track and there were marks of something dragging on the ties and on the rail for, as near as I can judge now, about fifteen hundred feet north of the bridge. Then from that on the mark was only on the rail; it was just a dragging mark on the rail. You could see the bright mark there. That extends for about three-quarters of a mile as near as I can recollect. The mark on the rail was a bright dragging mark right on top of the ball of the rail. You could see where something had dragged. It wasn't a burnt spot. A burnt spot is made by a slipping wheel, but this was a bright spot.

I was familiar with the road bed and track along the place of the wreck and with the bridge there at the wreck. It was in excellent condition in every respect. I don't know how long the track had been ballasted but it was re-ballasted in 1905. I think there was about two feet of ballast on the bed. The ballast was crushed lime-
stone rock. We never had any trouble in keeping that track
220 up. There were no soft spots on it and never gave us any
trouble except to re-tire it occasionally as tires were needed. I have charge of the maintenance of the track on that division. I am roadmaster and it is my business to see that the track is kept in good condition. I had been roadmaster twelve months at this time. I am still roadmaster at that same place. So far as I know the bridge was in first class condition. If it had been ten times stronger it would have gone done under the impact just the same. Of course I am no bridge man.

I am not a car man, but of course I have seen thousands of brake beams. *I* brake beam is attached to the body of the car on what are called hangers and the brake shoe is attached to the beam. I couldn't tell the size of the beam. It reaches from one side of the track to the other, in front and behind the wheels. It reaches across from one wheel to the other. I couldn't say what are the dimensions of a brake beam. I never had occasion to take a measure. They are more — four inches than one, but there are so many different sizes I couldn't give it. The beam hangs down from the body of the ca- and the shoes are fitted on the beams. Those brake beams sometimes get down while the trains are out on the road. It is a very common occurrence; even where they were up and in shape on leaving stations.

Cross-examination by Judge WOLFE:

It is a very common occurrence for a brake beam to get down and drag on the track. It happens, I might say, pretty near every day. They don't always have a wreck when one comes down. You can

see them fall down. If the train men are watching it they can see some fire or marks on the track. If I am riding on a train
221 and see anything dragging, I stop the train. If they are down dragging they throw out dust from under the train. If the train men discover it, they stop before it causes a wreck. If they don't, it is very apt to cause a wreck. Some of the brake beams are made out of wood and some are steel. I don't know much about them. The steel ones are tubular shaped. The steel ones are all tubular. There are some wooden ones. That is all the kind I ever saw, tubular and wood. Of course there is a different brake on locomotives. I don't believe I ever saw brake beams made out of such metal and of the same fashion as a rail. In fact I don't notice equipment very close only to see that it is all right. I don't know much about it; not about cars. In a general way I know how they are fastened. I know it about like some men on the jury might know it; just being around cars and seeing them. I have never made a study of that. It has never been my duty to repair them or build them. I know it just like any other man that casually observed those things. I don't believe I could tell how the brake beams are connected up with the air. I know they are worked with air cylinders. I know how an engineer sets the air on a train. He has got a lever in the cab. I don't understand the principle. I don't understand the working of the air at all. If he wants to apply the air, he turns the lever to the right. I couldn't tell whether that lets the air out of the train line or lets it in the train line to set the brakes. I don't know anything about it. I am a road man. I know more about cross ties and rails and road ballast than I do trains. I have seen them apply the air, but I don't understand the principle of it.

I said that about three hundred feet north of this bridge
222 there were indications that showed that the trucks of one of the cars at least had left the track. I did not say that then north of that for about fifteen hundred feet there were indications between the rails that something had been dragging. I said there were marks on the ties and on top of the rail. They were not between the rails. They were on the outside of the rails. The ties are eight feet long. For about fifteen hundred feet on the outside of the ties, on the outside of the curve on the ties and on top of the rail there were indications that something had been dragging. That was on the ties on the outside of the curve. The train was going south, and that was on the west side, right hand side or engineer's side; what we call the north side. We always call that north and south. We call one side of the track north and the other south. This would be on the right hand side coming south. I don't know whether it is what common people would call the west side or not. Speaking of the track generally as running south, it would be the right hand side coming south. For fifteen hundred feet I noticed this. That was to a public crossing. About fifteen hundred feet was the public crossing. This section only runs one mile north of where the wreck occurred and I went to the end of the section, just one mile. About three-quarters of a mile north from the point of derailment were the last of the signs I saw on the rail. From the point of derailment

to the last mark I could find on either ties or rail was about three-quarters of a mile and from the point of derailment to where I could see any marks on the ties was about fifteen hundred feet. About three quarters of a mile north from the point of derailment was the first evidence of something down under the train, and about fifteen hundred feet north from the point of derailment was the first evidence of the mark on the ties.

223 Those brake beams are held in position by what they call iron hangers from a bolt in the car that hangs right over the wheel. Dropping down through the sill of the car there is a bolt that has an eye on it, and then a straight piece of rod about twelve or fourteen inches long which has an eye on each end of it. One end fits in the eye on the bolt down through the beam and then there is a bolt that comes through the brake beam that has an eye on it and the lower end of this rod with the eye in it fastens through that. That is the way most of them fasten I believe. There are so many different kinds, and as I tell you, I am no car man at all. I judge that rod to be about ⅝ or ¾ of an inch. It is amply strong to hold it. If the nut was on the bolt in proper position I don't know whether it couldn't come down unless the rod would break or not. They do come down. They break off sometimes. I don't know why they do it. I suppose the men that make the cars don't build them so they break off in ordinary operation. Something has to be wrong with it in order for it to break off. Sometimes the air will set on a car. It couldn't be possible for anything, any obstruction, to catch a brake beam on the track. I have hea-d of a draw head falling out going along. It would catch the axle. The brake beams extend down lower than the axle. The brake shoe fits on the underneath side of the wheel below the center. That is the way it gets its power. The brake beam must be lower than the axle. If a guard rail should be so loose, or working on the ties, that when the trucks passed over, it would throw up the read end of it, it could catch a brake-beam and jerk it out. A guard rail couldn't fly up that way. They are all bolted together with fillers on our line. There are six bolts to every guard rail and spiked inside and out. I have seen trains run over railroad crossings and frogs when it would be

224 loose from trains constantly running over it and when it reaches the other end it comes up. I am speaking of railroad crossings. A constant hammering or anything of that kind could make that happen.

There is a system employed and in common use by the railway companies of this country for preventing the loss of a nut on a bolt. I am speaking of the track. We have a system on the track, but in the car department I don't know. I know what a cotter key is. If they put a bolt in and put a nut on the end of it and put a cotter key on, as long as the cotter key is in position the nut won't come off. And there is another way that they put another nut on top of it.

Q. And then there is a washer that they put down under the nut and suppose that the washer will keep such an elasticity on the nut it won't come off?

A. I have seen that, but no- on the Katy. We used to use a nut

lock but don't any more, just a plain nut lock. It wasn't made that way.

In the car department they may put on a nut and screw it down and then take a heavy punch and hammer and disturb the threads after the nut has been screwed down to its seat so the nut won't readily come over the bruised thread below. I don't know anything about whether they do it or not. Whether they do it or not, I suppose that would be a means of preventing the loss of the nut from a bolt. I don't know how the nuts and bolts on the hanging of this brake beam that is supposed to have come down on this occasion were fastened. I don't know anything about it.

I have been in the train service. I fired when I was a boy a good long time ago. I occupied the position of fireman. As fireman it was my duty to keep a lookout consistent with my other duties over the train behind me, watching for signals and
225 watching to see if my train had parted; watching to see if there was anything unusual that might cause injury or accident and signal the engineer and notify him so he could stop. That is the duty of all train men, conductors, engineers, brakemen and firemen. As soon as anything is discovered by any men on the train they don't have to communicate that to the engineer so he can stop. They can stop the train right from the caboose if they want to if they have a full train of air. A brakeman out on the line has no duty to perform other than to watch his train. It is his duty and also the duty of the conductor to discover any hot bozes, or any brake beams down or anything else that might cause a derailment or accident. A brakeman has nothing else to do but to sit up there and ride and watch the train between stations. That is all. There might be a number of cars in the train on which the brakes were not working, but still the conductor or the brakeman in the caboose could stop the train. There is a means of cutting the air out, but still the train line would continue through to the caboose.

G. P. Letts testified for defendant by deposition as follows:

Answers to Direct Interrogatories.

I am foreman of the round house department for the M. K. & T., Missouri, Kansas & Texas Railway Company. I live at Sedalia, Missouri. I have been in that position twelve years this last May. I was foreman, in that capacity, in the latter part of January, 1907.
226 I was on duty on the 30th and 31st days of January, 1907. I made an examination of engine five hundred and sixty such as I ordinarily make of all of them, casually walking around them to see that the work is done on them that is reported. That is in the ordinary line of my duty. It was the engineer's duty at that time to inspect them. They are now inspected, but at that time it was the engineer's duty to inspect them as they came in, and it is yet for that matter. It is the duty of the engineer to inspect the engine and we depend on his report for the work we do on the engine. There was a report made of a defect in engine 560. There was a

slight report of work on the work book. The engineer makes this record. That record is made in the ordinary course of business. It is their duty to inspect the engine and report any defects found. He makes it on the book. That book is in my hand. He makes an inspection after he leaves a trip. Before he leaves the engine he inspects it thoroughly and makes report of any defect he finds on it. They are held responsible for anything that is wrong on the engine. (Witness is asked to examine the record and state whether any notation is made of any defect on engine 560 on January 30th or 31st, 1907.) Engine 560. Here is the record. I will read it as it is, "Engine 560, Steam 200, Air 70; shaker bars broken." Signed "Bowser," the engineer. The shaker bar was repaired on that engine, replaced with a new one. That is the bar for the grate shaker. That is the only defect indicated in the record. The other, the steam and the air, that indicated that they were perfect. It is 200 pounds pressure of steam and seventy pounds pressure of air. The steam is what works the engine and the air brakes the brakes. The date of this record is January 30th, 1907, and was made at two A. M.

227 *Answers to Cross-interrogatories.*

I did not make that record. It is not my business to make that record. I know who made that record. I don't know of my own knowledge. Being made at two o'clock in the morning, I couldn't say that I know who made it. I can recognize that man's signature. I can verify that man's signature—Bowser. It is in his writing and I can verify his signature. The fact that he made a record shows that he inspected that engine that night. I don't know how much inspection he made, but I know that his job depended on his making the inspection. I don't know whether he made a thorough inspection of that engine that night or not.

Answers to Redirect Interrogatories.

I examine the book from day to day. I examine it as soon as the engineer makes the record. Of course at that time in the morning I wasn't there, but as soon as I got in in the morning I examined it and during the day I examine to see what work has been reported on each engine. I examine the report to see what work is to be done and I examine the engine to see what work has been done.

Answers to Recross-interrogatories.

I knew that a shaker bar was put in that engine at the time from the fact it is scratched off of the book, and from the fact that I am there to see that this work is done I know it was done. I wasn't
228 there when the bar wa put in, but I would not have allowed the engine to have gone out unless it was put in. That is what I am there for. That was just a simple matter, just a bar for the grate shaker.

(Deposition taken before H. D. Muir, Notary Public, Pettis County, Missouri, on 25th day of November, 1908.)

FRANK BERLIN testified by deposition for defendant as follows:

Answers to Direct Interrogatories.

My name is Frank Berlin. I am a car inspector for the M., K. & T. Ry. Co. I have been a car inspector twenty-six years at Sedalia. I don't remember all cars that I inspect. I couldn't. I don't keep a record of all cars that I inspect. No, I don't keep a record of all cars that I inspect that are in bad order, but I mark the car bad order and turn in a slip and report it to the foreman, all the bad orders. I haven't those slips or haven't any record of the bad order cars. I have no records. I turned them in to the office.

I nspected these cars in train Extra south engine 560 on January 31st, 1907. I don't know exactly what time the train left here, but it was after midnight. The cars in that train were in good condition. I examined every car and found everything in good order. I examined all parts of the cars, trucks and brakes. I don't remember the circumstances of this train being wrecked, going into the river, near Deerfield. However, I remember the inspection of the train. During my twenty-six years of car inspection I believe I consider that I have become experienced in that line of work. I
229 have no trouble whatever. If I find a defective car, I put a bad order card on the car and send it to the repair track for repairs.

Answers to cross-interrogatories.

I believe there were thirty-five cars in that train. At Sedalia I generally have two inspector helpers on the track with me. I had two helpers that night. One inspector was gone. No I didn't work that night short of hands to what I generally do. At that time there was only men—one inspector and two helpers. On January 31st, 1907, there was one inspector working at Sedalia. One inspector was absent on that night. I worked in the place of the regular man who was absent. I was on twelve hours that night. I did not work my regular hours and then the other man's hours too. I worked until noon and then went home and came back at six o'clock and worked until six o'clock in the morning. I was off six hours. I am generally off twelve hours. I was off just half as long as I generally am. I had my regular helpers that night. The helpers went with me over the cars. I went on one side and a helper on the other side. The helpers are not expert car inspectors. They are helpers and they might be car inspectors but at the same time they don't get that pay. I don't know whether they are expert car inspectors or not. I had three men that night, myself and two others. I was on one side and the two others on the other side. I was doing twice the work they were. At least I was inspecting one side of the car and the two others on the other side. As an expert inspector I can do twice the work that a helper can. I do. May be they are not as expert as I am. Then those men come *come* around and tell me what they
230 find. I don't know of my own knowledge whether they told me the fact or not. They didn't tell me anything. They

didn't tell me anything; not on that train. I mean no bad order cars on the train. I know of my own knowledge that those helpers examined those cars. I saw them. They report all defects to me. I know whether they did that night or not. Whenever they got over one car, they would pronounce the car O. K. or defective. I don't remember they told me anything being in bad order. They didn't report any defects. I don't know whether they saw any defects. It might happen that they might have seen defects in those cars and not reported them, but I don't think it could happen.

Q. The inspectors don't like to take cars out of the train do they, after the trains are made up?

A. That don't make any difference because if the cars are — bad order they have to come out of the trains. Switchmen break cars by switching after a train is inspected when it comes in.

It takes us from fifteen to twenty-five minutes to inspect a train of thirty-five cars. We make as thorough inspection just before the train starts as we do when the cars come in. We have to go on the car to see that everything is in good condition, anything that belongs to the car from the top to the bottom—wheels, brake beams, grab irons, hand holds, side of the car, roof of the car, brake, brake staff, brake chain, brake shoes, whether off center, center pin bolt. We examine every one of those things in every car. If a brake shoe is in good condition you can't knock it down at all unless the brake bolt or the brake shoe key breaks. The ordinary jolting and jarring of a train would not break the shoe bolt or the brake shoe key.

231 *Answers to Recross-interrogatories.*

If a brake had been out of place or brake shoe misplaced or brake shoe bolt or key out I would have discovered it when I made my examination:

(Deposition taken before H. D. Muir, Notary Public, Pettis County, Missouri, on 25th day of November, 1908.)

A. WALTER testified by Deposition for defendant as follows:

Answers to Direct Interrogatories.

My name is A. Walter. I live at Hannibal, Missouri. I am car inspector and rip track man for the the M. K. & T. Ry. and Wabash R. R. I have been a car inspector about twenty-two years and a half. As car inspector my business is to inspect the cars thoroughly—trucks, wheels, brakes, grab irons, couplers and the car in general, body of the car. I kept a record of defective cars only that I inspected in January, 1907. I kept a record only of defective cars. I examined all cars in incoming trains and outgoing trains that came on my time. I would make no record if a car was found in good order. If a car was in bad order, I would give the defects, that was damages or broken, whatever it might be. If no record was made of a car that was a sign that it was O. K. It was supposed to be
232 O. K. when I didn't make a record of it. When I found a defective car, if it was a defect sufficient to require repairs, it

was carded to the repair track, marked for the repair track, and I saw that they were repaired. I made these records myself. They are in my own handwriting. They were made at the time of the inspection. (Witness was asked to examine his records.) I understand that neither one of these cars came in on my time. I inspected the cars all right but not when they came in. I made an inspection of the cars anyway and the repairs were made.

Q. I will get you to examine your records so as to refresh your memory and state if any of the following cars were found in bad order by you in the latter part of January, 1907; on what day and what was the defect:

M. K. & T.	3307	Refrigerator
E. & T. H.	12302	Coal
M. K. & T.	40195	Stable
C. C. C. C.	785	Stable
C. B. & Q.	39358	Refrigerator
C. B. & Q.	96899	Box
St. L. I. M. & S.	19731	Box
G. T.	60063	Flat
G. T.	62020	Flat
D. L. W.	29650	Box
M. P.	33950	Box
St. L. I. M. & S.	18302	Box
C. B. & Q.	39063	Refrigerator
M. K. & T.	7434	Box
P. M.	51476	Box
M. D. T.	13498	Refrigerator
Big Four	4615	Box
C. & A.	37158	Box
M. K. & T.	11784	Box
M. P.	14035	Coal
P. R. R.	275471	Coal
M. K. & T.	20258	Coal
M. K. & T.	24376	Coal
C. & E. I.	10315	Coal
M. K. & T.	1871	Furniture
M. K. & T.	50107	Ballast
G. W.	1761	Coal
M. K. & T.	22333	Coal
M. K. & T.	21262	Coal
S. W. S.	4375	Stable
S. A. A. P.	4036	Refrigerator
M. K. & T.	3433	Flat
M. K. & T.	3605	Flat
M. K. & T.	3706	Flat
U. T. L.	4341	Tank
U. T. L.	4729	Tank
U. P.	31222	Coal
Caboose	92	

233 A. Well, on the 1st and 28th, that is January 28th, 1907, M. K. & T. 3367 had four short follower plates and six strap bolts broke. They might not have been broke, but that is the repairs that I made on it. That is what it took to make the repairs. One draft bolt broke and one door fastener and one eye-bolt. There were six three-quarter nuts and seven eighth nut. This was all the repairs at that time. The balance of the car was in good order, in good shape.

This car was marked out by another man and I had the repairs made on it. I looked the car over on the rip track. I have another one that I had repairs made on. It is Missouri Pacific coal car 14035. I made all needed repairs on it. I have no record of bad order against any of the other cars in the list. There is no other in that list that I have any record of, that is, of being in bad order or defects that would endanger the car, safety appliances or anything of that kind.

(Deposition taken before H. D. Muir, Notary Public, Pettis County, Missouri, on 25th day of November, 1908.)

A. J. CRANE, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. H. W. HEAD:

My name is A. J. Crane. My business is that of car inspector. My business was car inspector in January, 1907, for the M. K. & T. Ry. Co. at Franklin Junction.

234 When a train arrives the inspectors commence at whichever end of the train comes handy, rear or hind end, and go down the side and look under and inspect all the trucks, wheels and draw bars and everything pertaining to the cars and continue on until they get to the end. I inspect them by looking at them underneath and on the outside. I have records of cars inspected by me in January and February, 1907. If a car is in an unsafe condition and not safe to proceed any farther, I make a record on my book of course and bad order it and send it to the repair track. I make a record of all cars that I find in bad order that need repairs. I make a record of defects that are permanent on a car at my point. There might be minor little defects on the car that would be old and I might not make a record of them. They don't necessarily need repairs right at the time. Probably they go and probably they go to the shops many times before they are repaired. I don't make a record of old defects. There are defects that exist on cars for a long time until the car goes to the shops and has an overhauling. There are different defects to cars. A car could have a defect that would run for years without any damage to the car. I make a record of defects that do need repairs and that we repair right at that time. I mean that a car may gradually wear out and we don't repair it and tear away, but that kind of a defect I don't make a record of. At my place of inspection I will make a record of a new defect that is a permanent defect. Say that a car has been cornered some-

where and a side board broken, probably a roof board broken, been done new; well that car don't necessarily have to go to the repair track or shops sometimes, but I make a record of that in order for the company to trace the responsibility to the party damaging
235 that car. If I come to a defect that is old, probably I will pass that up. I don't repair it. I make a record of all defects that are repaired; all defects that are such that require repairing at that time. Defects that don't need repairing and are not of such character as require repairing at that time, I don't make a record of them at that time; not all of them. (Witness is asked to refer to his records for the latter part of January and see if on the 28th, 29th, or 30th of January he had anything to do with cars M. P. 33950, Iron Mountain 18302 or C. B. & Q. 39063). I can't find it on the 30th. I looked at the 29th, but can't find either one of these. I can't find any of those cars on the 28th, 29th, or 30th; can't find when I had anything to do with those cars. I was inspector in Franklin Junction on January 28th and 29th. My records show I was there. I was on duty from 7 a. m. until 6 p. m. in the day time. I have no record of those cars on my book, but I have the record of the car clerk showing that those cars arrived at my station during my work hours. Now, to the best of my judgment I inspected them. I don't have any definite recollection of inspecting those cars, but as they arrived on my time and my time of duty, I presume or have good reasons to believe that I did inspect those cars. I don't have a personal recollection of any cars inspected by me several years ago. I can't bear in mind all the cars I inspect. That would be out of the question. This list I have is made from a record and that record is made by the car clerk. The car clerk gets his information from the bills and lots of times he takes the numbers of the trains himself, but generally his record comes from the bills that the conductors turn in when they come in there off their run. The bill clerk keeps no record of the con-
236 dition of the cars. My record doesn't show the condition of those cars. This is just marked "condition O. K." I don't know where he gets that information. This record from the car clerk shows that these cars I have checked here on the paper arrived at our station during my work hours. The car clerk does not inspect the cars himself. He doesn't get any information as to the condition of the cars. There is no record made at my station as to the condition of the cars except the cars bad ordered. I make that record. If there are any cars that are bad order in the train, I make the record, but where a car is not bad order I make no record whatever. This paper that I have in my hand has nothing to do more than to show the arrival and departing of the cars. It is to show when they got there. My record as to inspection doesn't show those cars that Mr. Head called off. My record doesn't show any of the cars in that list at all. If those cars were in bad order and needed repairs and were repaired, my record would show it. My record would show them if they were bad order and needed repairs that is, if they needed repairs it would show it. I haven't any record that will show, aside from this memorandum, whether

those cars did in fact pass through my hands, through Franklin Junction; nothing more than this. This is the car clerk's record at the depot. This is a book that is kept there at Franklin Junction of cars that do pass there. It is a record of all trains in and out, and is one of the regular books kept there by the company. This is the original book. I found the most of that list of cars on this book; not all of them. Those I have checked there I found on this book. They are different dates on this book. I think they vary from indications, some I think.

237 Judge HEAD: Now we offer that book in evidence to show those cars and the time they passed through.

Judge WOLFE: We don't agree that those cars are shown on the book, but you can offer the book to show that as a fact. We don't object to whatever the book shows on that.

The WITNESS: This record shows that D. L. & W. 29650 arrived at Franklin Junction on the 1st and 30th at 4:30 p. m. in train five hundred and seven. It also shows that C. B. & Q. 39063 arrived there on the same date and same train. That arrived there the 1st and 30th, 1907. That is when it came through. It shows that 18302 Iron Mountain & Southern arrived on the same date and same train; G. T. 60063 same date and train; M. P. 33950 same date and train; I. M. & S. 19731 same date and train; G. T. 62020 same date and train. That is all I can find that came through there on the 30th.

Cross-examination by Mr. HARE:

I didn't say I live at Franklin Junction. I live at Booneville. I am inspector there at Franklin Junction. That is something like two and three-quarters or three miles I suppose from Booneville. I have been an inspector for the M. K. & T. there at Franklin Junction since 1894. I am supposed to be chief inspector in the day time. I have a foreman there; Mr. Brown is my foreman. There is only one inspector there now in the day time and one at night. There were two there in January, 1907—myself and what was called a helper. There was what they call an inspector and inspector's helper. The day man had a helper and night man had a helper. There were two men.

238 An inspector doesn't note all the defects he finds in a car; not the defects that are not dangerous to the car. We are careful to note all the defects in a car which are calculated to become dangerous. That is the principal part. Brake men frequently, in operating freight trains, have to pass along the top of the cars. I don't know at this time that they ever go from one hand brake to another to set the brakes on the train in the moving of the train. When they set a car out at a station they are supposed to set the hand brakes. Whether he sets the hand brakes or not, it frequently becomes necessary for a brakeman to pass along on top of cars. There is on top of box cars what is known as a running board. If that running board should get loose or become decayed or holes in it or nails projecting, it might become dangerous for him in passing over there. There are two sets of hand holds on an ordinary box car;

that is, ladders for getting up to the top of the car; one on each corner, on opposite corners. In order to get up on top of the car, the brakeman swings on to those hand holds and climbs it like you would a ladder to the top of the car. That is used very frequently, both when the train is out on the road and when it is in the yards by the switchmen in the yards and by the train men generally when they are out on the road. The coupling apparatus is always inspected with great care. If it gets out of fix, it is very dangerous for the operation of trains. The wheels are also inspected carefully. A broken flange or crack in a wheel might become disastrous to the train anywhere, so that requires particular and careful examination. The wheels and axle are all made solid. They are not like a wagon where the wheel turns on the axle, but the axle and wheels turn together. We have to examine the wheels and axles carefully.

239 Then we have to examine under the car to see whether or not the boulsters are in shape and see whether the car is off its center. If a car should get off its center, that would be dangerous. The brake rigging comes out at the end of the car, the brake rod proper, and the wheel at the top, which is handled by the brakemen. The rod extends down the end of the car and the brake rigging is underneath the car, at the ends, and extend- out to the side so that the brake rigging proper couples with the brake shoes. This brake rigging is made of steel or iron bars, the upper part of it; chains and iron bars and bolts. It is important to see that this brake rigging is all in working order. It is an important thing in the handling of freight cars to see that all the braking apparatus is in proper shape. While in a full train of cars one brake being out of condition wouldn't endanger that train of cars. I mean that one brake shoe not working against the wheel or not close up would not endanger it. The brake rods are about an inch in diameter. If one of those rods should get twisted out of shape so it could fly across the rail, it would be dangerous to the train. If a brake beam should come down, it would be a very dangerous thing. In other words, the braking apparatus of the entire train is of such material and of such dimensions that if any of it got down so as to strike the ties or rails, it is dangerous. It is liable to ditch the train. Of course in order to keep this brake rigging in proper shape it is necessary to examine the bolts that couple it on to the heavy work of the car, the sills, etc. There are eight wheels under an ordinary car approximately at the ends of the car. There is a brake shoe upon each wheel and brake rods extending throughout virtually the bottom of the car. There is what we call a bottom rod under each truck and then the

240 top rod and levers connect the two ends together. It is all under the bottom of the car. It is important to inspect the couplings, the connections, between the various rods. If they should get out of fic in any way, it would be rendered dangerous. In other words the running gear is the most dangerous part of a car.

It is also important to inspect the doors on the side of the car. If a door would be in such a condition that it would lose or fall iff, if the shaking of the train would shake it loose, it would probably hurt somebody. The doors ordinarily on those cars are hung from

pulleys, rollers, on top of an iron bar that they slide back and forth on. If they were loose at the bottom so that they would swing out at the bottom, that would be dangerous if somebody would be along the track. It would not be dangerous in the way of ditching the train, but it would be dangerous to people who are up near the train as it passed. Therefore, it is necessary to be inspected to see that it is not loose and swinging out. No, it wouldn't wreck the train if it was swinging out so as to strike a bridge in going through. It would not knock down the bridge. It is not that secure. It would knock the door off. But the danger to people who might be along the track such as section men or passengers requires of the inspector that he shall carefully inspect these connections, couplings and fastenings. That is the danger. I inspect the hand holds, the ladders on the side of a car, by looking at them. That is the way we inspect hand holds at our place. By merely looking at the hand holds generally you can tell, but sometimes it might not work. The
241 safest way to tell whether or not a handhold is in safe condition is to go and take hold of the hand hold and throw your strength against it, throw your weight on it. That is the proper way. We don't inspect them up there that way. The hand holds are ordinarily put on by bolts coming through the wood and the nuts are on the outside where they can be seen. The bolt comes through from the inside of the car to the outside. If the wood gets rotten, the paint over it probably might cover the rotten wood so that by looking at it it looked all right, where if you would go and take hold of it and give it a proper inspection by pulling on it it might pull through that rotten wood. Probably lots of hand holds are pulled off on account of rotten wood. I don't think they are all putn on with lag screws at this time and day. I think the proper way to inspect the hand holds would be to go up on top and pull on those hand holds and see if it is sufficient to hold and I think the company has men at certain points to do that.

The only way you can inspect that running board is to go on top and look at it. I don't do that. I inspect the wheels by looking at them. I don't tap them with an iron. I don't know whether that is improper or not. I don't know of anybody that taps wheels at this day and time in our country. If there should be a crack in the wheels that would be covered up with grease and soot, I don't think a tap would detect them. They don't tap them in our country. The only way I inspect the wheel- is to look at them. I inspect the rods under the car by looking at them. Men do walk along by the side of the cars at night with lanterns in their hands and look under there and see about the condition of the bolts and chains and all
those connections. I work in the day time. I have worked at
242 night a very little—two months. I could pretty well during that time. They have torches. Those chains and connections are not pretty well covered with dirt and soot and cinders and grease. There is not very much dirt and frease on the brake connections; not very much. I stated that it is important to make a careful examination of those things. I do that at my place; look at the brake rigging, etc. I don't mean by looking at them that I just walk along by the side of the car. I look under and try to see

all parts of the brake rigging, keys, brake shoes, beams and rods, etc. I don't get under the car. At the ends of the cars I walk between the cars and look under and at the insides of the trucks I look under the car. Where the cars are coupled together, I look under the end of the car on this side and under that side. I mean I go to the end of the car and look under. If it is in a train of cars, I take them one at a time. I don't move them out one at a time. I go between the cars and look under each end. I don't get down and go under the coupling where they are coupled with other cars. Say these are cars here in a train; I go between the ends. There is an opening you can walk in between and stoop down and look under each car. I walk up near the coupling and stoop down and look under the car. In looking under there I can examine all those bolts and connections. I can give a pretty good examination. Then I come up to this end and do the same thing. It takes me probably a couple of minutes to examine a car. I never timed myself. I never timed myself in regard to the time I used. I said I could go and examine what I examine in two minutes—the running gear. That is the way I examine them. If they didn't examine them the way I examine them, but they examined them in what I say would be the proper manner, I don't know how long it would take. That would necessitate climbing up the hand holds on top of the car. To ex-
243 amine the running board and grab irons would necessitate going up one side and down the other. I never timed myself, but I suppose it would take one man about three or four minutes probably to go over a car, over the top and underneath, and examine all the bolts and irons and connections, give it a proper inspection. I don't think it would take about ten minutes. My best judgment is it would take about three or four minutes.

I don't know how many cars come into that station of Franklin Junction on an average of a day during my working hours. I can't give any idea. I don't know about how many.

Redirect examination by Judge HEAD:

Franklin Junction is thirty-eight miles from Sedalia. They don't make the same kind of inspection at all places along the M. K. & T. where they have inspectors. They make more thorough inspection at Sedalia than they do at my place. They have more men there as inspectors. They have places where they have more men to do inspecting than they do at others. Franklin Junction is a very small place. I don't know just the number of the inhabitants of the point. There are two towns, New Franklin and Franklin Junction, that are incorporated as one. Probably the population of the two is one thousand. I am thirty-eight miles north of Sedalia. Hannibal is the next large inspection station north of Sedalia. It is about one hundred and forty-three miles from Sedalia to Hannibal. Hannibal is a good sized place. I never was there, but it is a good sized place. South of Sedalia I think Parsons is the next large inspection
244 station. I think it is something like one hundred and forty-three miles from Sedalia to Parsons. Along between those

places they have one inspector at Nevada. Nevada is between Sedalia and Parsons. Mine is between Sedalia and Hannibal.

Recross-examination by Judge WOLFE:

I have been inspector at other points than Franklin Junction but not on the M. K. & T. I have never been inspector at any other point on the M. K. & T. That is the only place I have ever worked on the M. K. & T.

They don't give a more thorough inspection at a city or town of a large population than they do in a town of a small population. In other words, the population of the city or town where the inspector lives does not have anything to do with the inspection. It is a fact that as many cars pass through my station of Franklin Junction as pass through Sedalia. And it is a fact that far more cars pass through Franklin Junction than Hannibal. There are more cars pass through Franklin Junction than pass out of St. Louis and come south through Hannibal over the Katy. We have a Junction there that connects the Hannibal line and St. Louis line. At Franklin Junction the line north from Sedalia divides and one branches and goes to Hannibal and then the other branches off and runs on the side of the river to St. Louis. They come together at Franklin Junction, so at Franklin Junction we get all the cars that come from St. Louis and Hannibal. And all the cars that pass through Sedalia bound north, whether for St. Louis or Hannibal, must pass through Franklin Junction. There is not any reasons why they should have
245 more inspectors in a large town than in a small town more than the facilities of the railroad demand it sometimes. The inspection is most needed where the most traffic is; ought to be. I don't know of any place on the line north of Parsons that there is more traffic than there is by Franklin Junction.

When I testified that they give a more thorough inspection in Hannibal and in Sedalia, I didn't testify that from my personal knowledge. They have more men at Hannibal. I just mean that they ought to give a better inspection there than I do. I think they do. They don't get better service in a big city necessarily, but where they use more men. When I inspect a car at Franklin Junction I don't act on the theory that the car has been thoroughly inspected at Hannibal or will be in Sedalia. When I inspect a train at my place, I am pretty near sure it is safe to go to the next place of inspection. The hand holds and tops of cars I say I don't inspect, but the running gear I do. Before I go out and look at them I don't just assume that they are all right. I do inspect the running gear, but I a- not required to inspect the top and climb over the cars and go from one end to the other. I don't know that it is a fac- that at Hannibal they haven't a man whose whole time is engaged in inspecting cars; that they haven't one single man who devotes his undivided time to inspecting cars. I never was there. I don't know it is a fact. I don't know Mr. A. Walter.

Q. He is inspector up at Hannibal and foreman of the rip track gang. That is what he says. Do you know him?

A. No sir. I have heard of him, but I am not acquainted with him.

246 If it is a fact that they inspect a car in Sedalia in thirty seconds, I would not say that they give a more thorough inspection than I make of the cars. I don't hardly think they could. If it takes me two minutes to make the inspection which I say is not thorough, it is bound to take a man to make a thorough inspection a longer time than it takes me. It is not possible for a man to thoroughly inspect a car in thirty seconds. I don't think he could in thirty seconds.

Redirect examination by Judge HEAD:

When a train starts from St. Louis, the engineer and conductor and crew with it come south to Mokane. That is the division now. They have inspectors there. The engineers and conductors get off there at Mokane. That is their freight division now. Then another crew picks the train up and takes it from Mokane to Sedalia. That crew runs from Mokane to Sedalia. Sedalia is another division. At Sedalia another crew gets hold of the train and takes it to Parsons. Mokane, Sedalia and Parsons are all division points. They are all ends of divisions.

Recross-examination by Judge WOLFE:

It is one hundred and five miles from Hannibal to Franklin Junction. It is one hundred and eighty-nine miles from St. Louis to Franklin Junction. It is one hundred and five miles from Hannibal.

Mr. HEAD: I read the deposition taken by plaintiff of Mr. H. O. MORROW, as follows:

247 *Answers to Direct Interrogatories.*

My name is H. O. Morrow. My age is thirty-one years. My residence is at Clyde, Nodaway County, Missouri, and my occupation is that of section foreman for the Wabash Railroad Company.

On January 31st, 1907, I was section laborer for the Chicago, Rock Island & Pacific Railway Company at Hadsell, Cass County, Missouri.

I know about the happening of the accident in which a shipment of cattle made by the plaintiffs over defendant railway was killed by reason of the car in which said cattle were being transported going through a bridge over Big Drywood Creek near the city of Nevada in the state of Missouri. I remember the occurrence. I saw the train before the happening of the accident and I was at the scene of the wreck after the accident, but the accident occurred on the 31st day of January, 1907, instead of the 31st day of January, 1906, and at that time I was section laborer for the M. K. & T. Ry. Company and resided at Deerfield, Vernon County, Missouri.

I was about one-fourth of a mile east of Dry Wood bridge when I first saw the train, standing on the public road crossing. The train

was moving west. Three other section men were standing with me at the time the train passed.

As the train came around the curve from the east, I noticed the fire flying from the wheel and noticed close to see if I could locate what it was that was causing it, and saw a brake shoe dragging on the rail and binding against the wheel on the front wheel of
248 the rear trucks on a car about twelve or fifteen cars from the engine. I was standing on the north side of the track and the brake shoe was dragging on the north side of the train next to me and I could see it plainly. It was dragging and the fire flying as long as I could see it around the curve.

Answers to Cross-interrogatories.

I am a white man. I belong to the Caucasian race, and I was requested to appear at the office of Shinabargar, Blagg & Ellison at Maryville, Nodaway County, Missouri, in order that my deposition could be taken in this case, and I have accordingly done so. The parties desiring my deposition must have gotten my name through L. W. Buster and Charles Fisher, other witnesses who were with me at the time of the accident.

I have never had any claims or suit against the M. K. & T. Railway Company, and none of my relatives or neighbors have so far as I know. I never have been a witness against the company before and cannot tell whether I ever will be again or not.

(Deposition taken before Wesley A. Blagg, notary public, Nodaway County, Missouri, on the 8th day of January, 1909.)

Mr. HEAD: Defendant offers the deposition of CHARLES O. FISHER, taken by plaintiff.

Answers to Direct Interrogatories.

My residence is Deerfield, Vernon County, Missouri; age thirty-seven. I have railroaded for several years. I am now in
249 the employ of Evans, foreman; that is, he is foreman on the Missouri, Kansas & Texas Railroad. I mean I am a section man engaged in working under Evans as foreman for the Missouri, Kansas & Texas Railroad. In January, 1907, I was living at Deerfield. I was working on the road at that time, the Missouri, Kansas & Texas Road, as section hand.

I remember the wreck of a freight train at Dry Wood Creek near Deerfield, in Vernon County, Missouri, on the last day of January, 1907. It was right at one o'clock when the wreck occurred, probably five or ten minutes before one. At that time I was about half a mile east of that bridge. That would be very nearly about a mile and a quarter east of Deerfield. The train was going west. It passed me before it reached the creek. The creek was west of us. We were nearly a half a mile from the creek at the time the train passed us. As the train went by I noticed sparks flying from the rail. I think it was the brake shoe dragging that caused the sparks. That

was what I took it to be. I think the car where I thought the brake shoe was dragging was about twelve or fifteen cars from the engine. I couldn't say what car it was and its position in the train, for it went around a curve. I think it was a box car, but I would not be positive.

The brake shoe clamps on to the wheel. It sets on to the beam, the brake beam. The shoe fastens on to the wheel. That is where it stops it. The brake beam is that that goes from one wheel to another that the shoe is fastened to. It is composed sometimes of wood and sometimes of steel. I don't know what it was in this case. I don't know whether it was a wooden one or an iron one. There were lots of them down at the bridge torn off the cars. The brake shoe is fastened to the brake beam with a key generally. I don't
250 know as I ever saw one that wasn't. It was the shoe that I took to be down. That was not having any effect on the wheel just at that time, for it wasn't hardly touching the wheel. It was touching the rail. When it would get plumb loose, then it would get under the wheels. I did not notice whether the car was upright or whether it was leaning at the time it passed me. I never noticed anything out of the way that way.

After the train passed, we put on our hand car and started back and we got in 150 or 200 yards of the caboose and we met a brakeman coming back to flag, and he asked the foreman, Mr. Buster, if he wouldn't send a man back in his place to flag as he was crippled. I went back to do the flagging. I took his flag and torpedoes and went back. As I went back over the train I noticed fresh marks on the ties where something had been hitting. I noticed a few white spots on the rails right across the crossing there where the train passed us. I was over a quarter of a mile from the creek before I noticed those marks. I noticed them about half a mile from the creek. That was where they were plainest. The indentations in the ties were easy to be seen. There had been some rod or something hitting them. It was plain from the fresh marks. Of course, I never saw what did it. I couldn't swear to that. Mr. Buster, Will Hawk, Ol. Morrow and another fellow, Frank Shoemaker, were with me at the time. I did not go down to the wreck at all until after dark. I stayed back and flagged. I did not examine the car on which the brake shoe was down. It was dark and they had been pulling there with a derrick before I got there—just about dark when I came back.

251 *Answers to Cross-interrogatories.*

It was about five or ten minutes before one when the train passed me. Where it passed me was about a half mile from the creek; right at it. We got the hand car and started after the train after we heard the train fall into the river. It was out of sight of us. We didn't start after the train because of our noticing this brake shoe down. We knew that it had fallen into the river or fallen off the track. I am not sure that those marks that I discovered on the ties were not there before the train passed. I couldn't swear to that. They were right fresh, but I couldn't swear to that. I would not

swear whether they were made before, but they were fresh. From my observation, they might have been there before that train passed, so far as I know. I didn't notice the track particularly coming up before that train passed. I didn't observe these marks on the ties until I heard the train go into the creek and when I started back down to the train.

Sometimes two or three freight trains pass that place during the day and sometimes there ain't nary one. Sometime- they don't run as regular as other times, for there are extra trains sometimes. I don't recollect that day whether there had been any before or not. That was the last day of January. In that season of the year there were a number of freight trains passed over that track in twenty-four hours, but there were part of them at night you know.

There were sparks coming from the rail caused by the brake that attracted my attention when the train passed me. I saw the brake shoe on the track. I took it to be the brake shoe dragging on the side that I was on. I was on the north side.

252 Q. You can state positively that there was something dragging under the car on the track?

A. It was on the rail. The brake shoe hanging right square over the rail.

This brake shoe was dragging on my side of the train. It was on the same side that I was on. This brake shoe was dragging on the back end of the car. The car was going west. It was on the back end; on the rear end.

Answers to Redirect Interrogatories.

I don't remember any other freight trains having passed along that road that morning.

(Deposition taken before John S. Underwood, notary public, on the 30th day of October, 1908.)

LABON W. BUSTER testified by Deposition for Defendant as follows:

Answers to Direct Interrogatories.

I live at Deerfield, Vernon County, Missouri, and am farming now. I was fifty-seven years old the second day of February. On the last day of January, 1907, I was section foreman at Deerfield station, on the Missouri, Kansas & Texas Railway. I remember the wreck of a freight train at Dry Wood Creek about that time. I came in for dinner and we started out a little before one o'clock and the wreck occurred right close to one o'clock. I didn't notice exactly what time of day it was, but we just had time to run to the crossing. We went a mile and a half east and set our car off *the* meet the freight train. The train had to pass us before

253 reaching the creek. I was on the east side of the creek and the south side of the track, I guess right at half a mile east of the bridge. The train was going west. It was a freight train. I don't know how many cars they had in the train. They were

twenty-five or twenty-six cars; maybe thirty. There was one car of bulls and cows; I think thirteen head of cattle in the car. I noticed somebody in the car with the cattle. I saw a fellow when the train passed me. There was a young fellow in the car and he waved his hand at me. This car in which the young man and the cattle were located was in about the center of the train. The door was on the west side of the train and he was standing in the door. One of the men called my attention to something about one of the cars after they passed us. I did not notice anything, after he called my attention to the car, about it. We heard them going in the creek about that time. I examined the track. There had been something dragging, from where it passed us to the bridge, on the top of the rail. It knocked chips out of the ties where it went and sparks out of the track, and you could see the marks of the shoe, or whatever it was, right on top of the rail. I didn't see what it was myself and am unable to state now. I went to the wreck. When we got to the wreck, we found ten cars in the creek. The car containing the cattle was down in the creek. There were three or four cars piled on top of the cattle. They were in the bottom. I was there when the cattle were taken out. They were dead then. The cattle were drowned. The creek raised and they would have drowned if they had been alive.

I did not examine the brake beams of any of the cars to determine the cause of the wreck. There were three or four cars just broken all to pieces right there in the bottom of the wreck. I couldn't tell anything about that. The train was running about thirty
254 or thirty-five miles an hour.

Answers to Cross-interrogatories.

Mr. Fisher and I were not on the same side of the track as the train passed us. He was on the north side and I was on the south side. I found these marks on the rail on the north side of the track and in the center of the track.

I said that when the car passed me in which the cattle were, that a man who was in the car was standing in the door. He waved his hand. I stated that he was in the door on the west side of the car. Well, he would have been in the south door of the car. After it gets across the bridge it turns west. I didn't intend to say that he was in the west door of the car. He was in the south side of the car.

Answers to Redirect Interrogatories.

The wreck that Mr. Fisher and I have referred to in our depositions is the only wreck that occurred on the Missouri, Kansas & Texas Railway of a freight train at Dry Wood Creek about the last of January, or first of February, 1907.

Mr. HEAD: We want to offer now the contract.

"Missouri, Kansas & Texas Railway Company.

Rules and Regulations for the Transportation of Live Stock.

Notice.

This company has two rates on live stock.

255 Ordinary Live Stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be at less than published tariff rate applying thereon when transported at carrier's risk.

All kinds of Live Stock, Carrier's Risk, will be taken under the provisions and at rates provided for by existing tariffs and classification.

Special Live Stock Contract No. 4.

Executed at Pilot Grove Station, 1/30/1907.

This agreement, entered into by and between the Missouri, Kansas & Texas Railway Company and each carrier adopting it, hereinafter called the carrier, party of the first part, and Harriman Bros., hereinafter called the shipper, party of the second part, this 30th day of Jan'y, 1907. Witnesseth:

The carrier agrees to let the shipper one box car, numbered 51476 P. M., which the shipper has selected and desires to use for the shipment of 13 head of cattle consigned to Harriman Bros. at Enid, O. T., and when loaded and delivered to carrier, to haul the same, together with the shipper party or parties in charge thereof, from Pilot Grove to Guthrie, O. T., all as hereinafter provided at the

(Do not insert any station beyond our line.)

rate of —— dollars per car, or —— cents per hundred pounds, from —— to destination, subject to minimum weights and length of cars provided for in tariff, the same being a Special Rate, which the carrier guarantees, and less than the regular tariff rate applying on shipments of live stock not covered by this Special Con-

256 tract.

It is mutually agreed that if the destination of the aforesaid cars be on the line of the Missouri, Kansas & Texas Railway, then the Missouri, Kansas & Texas Railway Company agrees to deliver same to consignee after payment of charges and surrender of this contract, but if the destination of such cars be beyond the line of the Missouri, Kansas and Texas Railway, then the Missouri, Kansas & Texas Railway Company agrees, and it, and each connecting carrier in turn, is hereby authorized to deliver said cars to its connecting carrier for transportation under the terms, stipulations, limitations and agreements herein contained, and each and every carrier receiving said car for transportation shall be deemed to adopt the terms and conditions hereof and assume the like liabilities and shall be entitled to all the provisions, exemptions from the

limitations of liability and other stipulations governing the measure and adjustment of damages herein contained, it being understood and agreed that the duty and liability of the Missouri, Kansas & Texas Railway Company and that of every other carrier transporting said cars hereunder, absolutely ceases and terminates upon delivery by it of said cars to its connecting carrier.

In consideration of said Special Agreement by the carrier, it is further mutually agreed and stipulated as follows:.

1. The shipper agrees to select no car for transportation of his live stock which is not in a suitable condition therefor, but the carrier shall upon demand made by the shipper, either before delivery to it for transportation, or while in transit, make any needed repairs at its cost.

257 2. The shipper shall load, unload and re-load said cars and see that the same are securely fastened, and shall feed and water said live stock and attend to them while in carrier's stock yards, pens or said cars at his own cost and expense, but the carrier agrees to allow said shipper free use of its pens and chutes. The shipper shall leave said pens and chutes in like condition which he finds them.

3. The carrier shall stop said cars at any of its stations where it has facilities for watering and feeding, whenever requested to do so by the shipper, and shipper agrees that he will not confine said live stock for a longer period than twenty-eight consecutive hours without unloading same for rest, water and feeding for a period of at least five consecutive hours, provided he is not prevented from doing so by storms or other accidental causes, and the character of the cars used will not permit of their being properly fed and watered therein, and the carrier agrees to have its pens arranged so as to allow him to do so.

4. The shipper shall, upon the arrival of the cars at destination and delivery to him, unload said live stock and surrender said cars in the like condition which he found them, except as against acts of the carrier.

5. The carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting from his negligent doing, or failure to do any of the things which he hereby contracts to do or from the negligence of any of his servants.

258 6. The shipper is in no sense an agent, employé or servant of the carrier, but is his own master in and about the matters and things by him to be performed under this contract, and he shall furnish all of his own employés for doing everything which he hereby contracts to do and which he cannot do personally, and the carrier shall be liable for no act nor omission of the shipper, nor of his servants, nor for the acts of any of carrier's servants at the request or for the advantage of shipper, but said servants of said carrier shall for the time be considered employés of the shipper. The

carrier, however, agrees to make no charge for the time of such servants. In no case shall the carrier be required to carry more employés of the shipper, including shipper, than endorsed on the back hereof, and none except those whose names are written hereon.

7. The shipper, party, or parties in charge of said cars will only be carried on the train drawing said cars and in accordance with the rules on the back hereof, and his or their failure to observe said regulations shall be prima facie evidence of negligence on their part in case of injury resulting therefrom. And he and they, and each and every of them, who shall receive any injuries by reason of the negligence of the carrier, or otherwise, shall have no right of action therefor, unless notice in writing of the claim for damages on account of such injury be given to the nearest, or any other convenient Local Agent of the carrier or the General Manager of said Railway Company at St. Louis, Missouri, within thirty days of the date of the injury. Such notice must state the time, place and particulars of the injury, and the nature and extent of the damages, and no other or further damages can be recovered than those set forth in this notice.

259 8. The carrier does not ship live stock or Emigrant Outfit under this contract or at the rate hereon given upon which its liability in case of any loss or injury, shall exceed the following prices per head:

Each horse, (gelding, mare, stallion Mule or jack)	$100.00
Each pony or range horse	30.00
Each Ox, Steer or bull	30.00
Each cow	20.00
Each calf or hog	7.00
Each sheep or goat	2.00

Emigrant Outfit (not live stock) consisting of Emigrant Movables, Household Goods, Second-hand Farm Machinery, etc., when loaded with live stock, as per classification at valuation of not to exceed $5.00 per 100 pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation, or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitle- to recover only actual damages, but in no instance more than the stipulated valuation shown above.

9. The shipper shall furnish reports signed by himself and all parties in charge of said live stock, to the conductor of the train at the end of each division of carrier's line, as to the condition of the live stock, and the shipper shall be estopped from denying the truth of such reports, and his or their failure to furnish such reports shall be conclusive evidence that live stock were in good condition. The shipper further expressly agrees that as a condition precedent
260 to his right to recover any damages for any loss or injury to said live stock resulting from carrier's negligence as afore-

said, including delays, he will give notice in writing to the conductor in charge of the train or the nearest station or freight agent of the carier on whose line the injuries occur before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed from pens at destination. In his notice he shall state place and nature of the injuries to the end that they may be fully and fairly investigated, and said shipper shall within 30 days after the happening of the injuries complained of, file with some freight or station agent of the carrier, on whose line the injuries occurred, his claim therefor, giving the amount. Shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said live stock as aforesaid, and no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute or limitation to the contrary notwithstanding, and no damages can be recovered except those set forth in the required notice and claim.

10. As a further consideration for the reduced rate herein given, the shipper hereby releases and waives any and all causes of action for damages by reason of any written or verbal contract for the shipment of said live stock or any of them prior to the execution hereof, and will hold the carrier harmless for any and all claims for injuries to persons accompanying said live stock as aforesaid, resulting from carrier's employés, negligence or otherwise, and will indemnify it for any damages it may be required to pay by reason thereof,
261 or any expenses it may be put to, or damages it may be required to pay, by reason of the introduction of said live stock into a country or State against the quarantine or other laws of the United States or of any State, people or community.

No agent of this Company has any authority to waive, modify or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do.

Executed in duplicate the day and date first aforesaid.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By L. G. HUNTER, *Agent.*
HARRIMAN BROS., *Shipper-.*

Written across the face of the contract in pencil are the words "Paid 80.30."

Mr. HEAD: It is agreed that there is no statute in Missouri like the statute of Texas prohibiting the limiting of the common law liability by special contract as in this instance except there is a statute which prohibits the limiting of the time within which suit is to be commenced to less than the statutory period, and that the common law is in force in Missouri. We agree that in reference to the decisions in Missouri under the statute and common law that either party can introduce such decisions as they think bear on the ques-

tion from the Southwestern Reporter or Missouri Reports without making formal proof as to the decision.

262 Mr. HEAD: We offer the following portions of I. C. C. tariff No. A-1636, M., K. & T. Local Distance Tariff No. 2548 applying on classes and commodities:

Missouri, Kansas & Texas Railway Co.

The "Katy" Route.

Local Distance Tariff No. 2548.

(Cancels No. 737.)

Applying on classes and commodities between stations on the Missouri, Kansas & Texas Ry. as follows:

Between Stations In	And Stations In
Indian Territory.	Oklahoma Territory.
Missouri or Kansas.	Indian Territory.
Missouri or Kansas.	Oklahoma Territory.

And locally between Stations in the Indian or Oklahoma Territories.

Rates in Cents Per 100 lbs.

Cattle (See Rule 3.)

Distance.	Commodities—Carloads.
380 miles and over 370	26½

Rule 3.

Live Stock—Continued.

263 Limitation of Liability.—Rates provided on Live Stock will apply only on shipments made at Owner's Risk, with limitation of liability on the part of the Railroad Company as common carrier under the terms and conditions of the current Live Stock contract provided by this company, the contract to be first duly executed in manner and form provided therein.

120 per cent of the rates named in this Tariff will be charged on shipments made without limitations of carrier's liability at common law and under this status, shippers will have the choice of executing and accepting contracts for shipments of Live Stock with or without limitation of liability, the rates to be made as provided for herein.

L. G. HUNTER, being duly sworn and introduced as a witness for defendant, testified as follows:

Rirect examination by H. W. HEAD:

My name is L. G. Hunter. In January, 1907, I was agent at Pilot Grove for the M., K. & T. I am acquainted with Mr. Harriman and his nephew. I was agent there at the time they made a shipment of thirteen head of stock over the defendant's road to Guthrie or Enid, Oklahoma. I was agent in charge of the station there at that time. I attended to the shipment in behalf of the railroad company. (Witness is handed a paper and asked what it is.) That is the contract; copy of it. That is the contract under which the cattle were shipped. I got the rate, under which
264 the cattle were shipped, from the general freight agent. I gave it to Mr. Harriman. I am the one that quoted him the rate. I told Bert Harriman—no, I don't remember which one I told, but Mr. Bert Harriman paid it. Mr. Bert Harriman attended to the shipment. Mr. Bob Harriman ordered the car. The rate to Enid that the cattle were shipped on was thirty-six and one-half cents. The defendant's road ran from Pilot Grove to Guthrie, Oklahoma, and connected with the Enid road. I think it was the Denver & Gulf road or Santa Fe from Guthrie to Enid. The rate on which the cattle were shipped from Pilot Grove to Guthrie was twenty-six and a half cents. I didn't look it up to see if that rate is provided for by any tariff of the defendant. After the general freight agent told me what it was, I didn't look it up. The general freight agent advised me on the rate. (Witness is handed another paper and asked what it is.) This is a tariff, local distance tariff between those points in Missouri. I think the distance from Pilot Point to Guthrie is two hundred and eighty miles. I have no way of telling for certain unless I figured it out. It is two hundred and eighty miles I think. I haven't a time table of the road with me. (Witness is asked to figure out the exact distance from Pilot Grove to Guthrie.) It figures out just three hundred and eighty miles. The rate provided by this tariff that I have for shipments of cattle from Pilot Grove to Guthrie is twenty-six and a half cents. I don't know whether or not the Katy had any joint through rate from Pilot Grove to Guthrie. I got the rate of thirty-six and a half cents from the general freight agent, that rate being made up of twenty-six and a half cents over the Katy to Guthrie and ten cents
265 beyond. The amount of freight that was paid by Harriman Bros. for that shipment was $80.30. That amount was based on this rate of twenty-six and a half cents to Guthrie and ten cents beyond. That is the rate which we use a live stock contract for. When I quoted that price, it was quoted with the expectation on my part that a live stock contract would be executed covering the shipment. This tariff does not show a rate to Enid. It shows a rate on a shipment to Guthrie going to Enid. It says twenty-six and a half cents. That is the lowest rate provided by this tariff. The rate of twenty-six and a half cents was the rate provided in cases where the regular form of live stock contract was issued. In billing

out a car of that kind we use the minimum weight provided by the tariff. The minimum weight is in the tariff. We get that minimum weight from the general freight office. The minimum weight used on this shipment was twenty-two thousand pounds. That is what we charged for; charged them twenty-six and a half cents per hundred pounds to Guthrie. The minimum weight is the weight we use, provided they don't weigh over that. We charge that in any event, even though it weighs less. If it weighed more, we would charge on the surplus weight. Ordinarily thirteen head of cattle would not weigh over the minimum weight.

Cross-examination by Judge WOLFE:

That rate of twenty-six and a half cents to Guthrie was the rate shown by the tariff. That is the rate per hundred pounds on cattle. We call that rate a cattle rate to distinguish it from any other rate.

(Witness is asked to point out the rate on the tariff.)

266 I have been station agent at Pilot Grove about four years. I was there when this rate went into effect. We ship a good many cattle from Pilot Grove and have during each year I have been there. During the whole time I have been there I have never used any other rate except this cattle rate I have shown here. I have never shipped any cattle from Pilot Grove under any other rate than this cattle rate shown in figures just as this twenty-six and a half cents is shown. The rate that has been charged on all those numerous shipments that have been made since I have been agent there has been the same rate as I pointed out here—not the same cents of course, but based on the same rate as the twenty-six and a half cents is based. We use the same contract for all. That is the only contract I had in that office.

Redirect examination by Judge HEAD:

I say I have never made a shipment from Pilot Grove on any other contract except this kind. Nobody has ever requested to make a shipment without a contract of this kind.

Recross-examination by Judge WOLFE:

When I was asked to quote rates, I always quoted the same rate and figured in the same manner as the twenty-six and a half cents was in this instance; universally quoted that rate.

267 JOHN W. CONNER, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Mr. H. W. HEAD:

My name is John W. Conner. In January, 1907, I was commercial agent for the M., K. & T. As commercial agent I solicited freight and looked after the freight business generally. I had something to do with rates. I had a full line of tariffs and quoted rates to local agents. The Missouri, Kansas & Texas Railway Company

did not have any through rate from Pilot Grove, Missouri, to Enid Oklahoma. They had no joint through rate. They did not have any rate that applied to a shipment of cattle from Pilot Grove to Enid, except a combination of local rates is the only way we could make a rate. On shipments moving over our line and then another road, we could make a rate to the junction line and could then get the rate from there on on the other road and make a rate. We could make a rate on the Katy from Pilot Grove to the junction point and then from Junction point to destination on the other road. On a shipment of cattle moving from Pilot Grove to Enid, Oklahoma, Guthrie would be the nearest junction point I think. If the cattle went by Guthrie, the Katy had a rate applicable to that shipment to Guthrie. They had a live stock tariff making rates for Kansas City and St. Louis and they had a distance tariff on interstate business. (Witness is handed a paper and asked to state what it is.) This is a distance tariff on interstate shipments, Missouri, Kansas and Indian Territory, and Missouri, Kansas and Oklahoma Territory. This is a local distance tariff. If a shipment of cattle was delivered to the M., K. & T. for shipment to Enid via Guthrie, if this tariff
268 made a lower rate from Pilot Grove to Guthrie than the live stock rate made from St. Louis to Guthrie, we would use this tariff. The live stock tariff I refer to is the M., K. & T. live stock tariff. (Witness is handed another paper and asked to state what it is.) This is the M., K. & T. Live Stock Tariff. If tariff I. C. C. No. 1636, being the local distance tariff, quotes a less rate from Pilot Grove to Guthrie than tariff I. C. C. No. 2713, then tariff No. 1636 applies. I would have to take the distance table to figure on which takes the lowest rate. The distance is three hundred and eighty miles. The local distance tariff shows a rate of 26½ cents a hundred. The other tariff is 38 cents. So that tariff 1636 would apply. In January, 1907, we did not have any other tariffs that applied to the shipment of cattle from Pilot Grove to Enid, via Guthrie than these two tariffs. The lowest rate provided by this tariff on stock from Pilot Grove to Guthrie is 26½ cents. Within my knowledge it was the universal custom of the M., K. & T. to require the execution of a written contract live stock contract, its current form, where the lowest rate was used.

Cross-examination by Judge WOLFE:

I am not sure about whether Mr. Harriman got the rate from me in this case or not. I quote a great many rates; might have quoted him this one. I am not positive about whether Mr. R. L. Harriman requested me to know what it would cost him to ship to Enid and I told him 36½ cents or not. I quote him rates frequently. I don't remember this particular instance. I am not sure about that.

269 Mr. HEAD: The certified copies of the pedigrees of these cattle are offered in evidence:

"American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in American Short-horn Herd Book.

Bull.

Name, Golden Crown. 217446.
Color, Red. Calved May 14th, 1903.
Bred by E. G. Donahey; P. O., Newton, Iowa.
Owned by Peden Bros.; P. O., Spencer, Ind.

		Sire's number.
(Vol. 47, p. 104.) Got by Golden Fame		144750
Out of Imp. Enchantress	by Prince of Fashion	136634
Actress 2d.	by L'rd Douglas	132003
Actress	by Eastern Star	149536
Abbess	by Red Duke	132074
Columbine	by Charmes Windsor	132066
Dairy Girl	by Star of Peepy	151810
Daisy	by Lord Eskdale	108795
Daffodil	by Rover	144850
Anna 2d.	by Sovereign 2d.	144853
Anna 1st.	by Red Knight	
Peg 4th.	by Duke 3d.	(17697)
Peg 3d.	by Garioch Lad	58616
Peg 2nd.	by Dandy	
Ury Peg	by Ury Champion	
	by Son of Pilot.	

270 This is to certify that the above pedigree has been recorded in *Bol.* 59 on page 265. In Testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*

Clerk F."

American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Name, Royal Crown. 254623.
Color, Red. Calved Aug. 5th, 1905.
Bred by J. J. Littrell & Sons; P. O., Clark, Mo.
Owned by Harriman Bros.; P. O., Pilot Grove, Mo.

		(Sire's No.)
(Vol. 48, p. 410.) Got by Scotland Crown		138994
Out of Roan Oss	by Prince Rupert	104945
Oss	by Victoria Baron	105859
Orphan 7th.	by 5th Royal Ravenswood	44890

	Orphan 5th.	by Speculation	27933
	Orphan 3rd.	by John Morgan	8427
	Orphan 2d.	by Basil Duke	6434
	Orphan	by Lord Napier	4117
	Red Mollie	by John O. Grant	3030
	Amelia Cunningham	by Fortunatus	1564
	Bertha	by Scioto	949
	Mary	by Prince Albert 2d.	857
	Mary	by Cossack	(3503)
	Judith Clark	by Goldfinder	(2065)
271			
	Imp. Young Mary	by Jupiter	(2170)
	Mary	by Soladin	(1417)
	Lucy	by Meeks Bull	(2288)

This is to certify, That the above pedigree has been recorded in Vol. 66 on page 196. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*

Clerk F."

American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.

Name, Golden Acorn.
Color, Red. Calved June 9th, 1906.
Bred by Harriman Bros.; P. O., Pilot Grove, Mo.
Owned by —— ——.

			Sire's Number.
	(Vol. 60, p. 957.) Got by	Golden Crown	217446
	Out of Carnation Charm	by Barmpton Bud	152945
	Orange Acorn	by Sir Charming 2nd.	123972
	Princess of Acorn 2nd.	by Commander	79556
	Princess of Meadow Ridge	by El Sabio	103105
	Princess of Linwood	by Baron Victor	42824
	Princess of Aberdeen	by OrangeLad	46679
272			
	Imp. Acorn 2d.	by Scotland's Pride	(25100)
	Acorn	by The Czar	(20947)
	Oakleaf	by The Baron	(13833)
	Aroma	by Matadore	(11800)
	Admah	by Fitz Adolphus Fairfax	(9124)
	Brokenhorn	by Fitz Leonard	(7010)
	Princess	by Sovereign	(7539)

This is to certify, That the above pedigree has been recorded in Vol. 69 on page 766. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D., 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*
Clerk F."

273 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Name, Golden Bessie.
Color, Red. Calved May 15th, 1906.
Bred by Harriman Bros., Pilot Grove, Mo.
Owned by " " " " "

		Sire's Number.
(Vol. 62, p. 746.) Got by	Golden Crown	217446
Out of Ortiz Bessie 2d. by	Ravenswood Lavender Viscount	186158
Butterfly of Hazelridge 15th.	by Burgomaster	90813
Butterfly of Hazelridge	by Leddesdale	70486
Butterfly of Athelstone	by Crown Prince of Athelstone 2d.	16585
Imp. Butterfly 44th.	by Victory	21842
Butterfly 36th.	by Cæsar Augustus	(25704)
Butterfly 10th.	by Grand Monarque	(21867)
Butterfly 3d.	by The Baron	(13833)
Butterfly	by Matadore	(11800)
Buttercup	by Report	(10704)
Bounty	by The Pocha	(7612)
Strawberry	by 2d Duke of Northumberland	(3646)
Margaret	by Mahomed	(6170)
Mary Ann	by Sillery	(5131)
Miss Gibson	by Carleton	(843)
Dora	by Diamond	(205)
Kelly	by Diamond	(205)

This is to certify, That the above pedigree has been recorded in Vol. 69 on page 766. In testimony whereof, I have affixed
274 the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*
Clerk F."

American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.

Name, Golden Thistle.
Color, Red. Calved Feb. 26th, 1906.
Bred by Harriman Bros.; P. O., Pilot Grove, Mo.
Owned by —— ——.

		Sire's number.
(Vol. 47, p. 325.) Got by	Golden Crown	217446
Out of Fennel Duchess of Thistlewood	by Thistlewood	95417
Fletcher 42d.	by Dike of Vermilion	80443
Imp. Princess 7th.	by Duke of Rowley	45260
Princess	by 2d Duke of Wetherby	(21518)
Fennel Duchess 5th	by 13th Duke of Oxford	(21604)
Fennel 3d.	by Cherry Duke 2d.	(14265)
Fennel	by 5th Duke of York	(10168)
Filbert	by 2d Cleveland Lad	(3408)
Felicia	by 4th Duke of Northumberland	(3649)
Fanny	by Short Tail	(2621)
Fletcher 2d.	by Belvedere	(1706)
Fletcher	by Son of Young Wynyard	(2859)
	by Descended from J. Brown's Red Bull	(97)

This is to certify, That the above pedigree has been recorded in Vol. 69 on page 767. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*
Clerk F."

275 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Bull.

Name, Golden Block. 271735.
Color, Roan. Claved April 2, 1906.
Bred by Harriman Bros.; P. O., Pilot Grove, Mo.
Owned by —— ——.

		(Sire's Number.)
(Vol. 47, p. 325.) Got by	Golden Crown	217446
Out of Mt. Vernon Butterfly 2d.	by Red Butterfly	109704
Princess Kingscote 3d.	by 12th Duke of Harrington	62305

Valley Princess 21st.	by Col. Kingscote	32031
Valley Princess 12th.	by Lord Wooster	14792
Strawberry 2d.	by Mozark	5976
Strawberry	by Cornelia	2601½
Alma	by Rubber	934
Zarilda	by Specie	(5289)
Zelia	by Rifleman	(2532)
Desdemona 2d.	by Bertram	(1716)
Zulinda	by Malcolm	(1190)
Imp. Desdemona	by Frederick	(1060)
Delia	by Cleveland	(146)
Red Daisy	by Major	(398)
Strawberry	by Windsor	(698)
Old Daisy	by Favorite	(252)
Daisy	by Punch	(531)
Old Daisy	by Hubbock	(319)

This is to certify, That the above pedigree has been recorded in *Bol.* 69 on page 327. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*

Clerk F."

276 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.
Name, Scotland's Beauty.
Color, Red. Calved July 15th, 1906.
Bred by J. L. Littrell & Sons; P. O., Clark, Mo.
Owned by Harriman Bros.; P. O., Pilot Grove, Mo.

		(Sire's Number.)
(Vol. 48, p. 410.)	Got by Scotland's Crown	138994
Out of Roan Osa	by Prince Rupert	104945
Osa	by Victoria Baron	105859
Orphan 7th.	by 5th Royal Ravenswood	44890
Orphan 5th.	by Speculation	27933
Orphan 3d.	by John Morgan	8427
Orphan 2d.	by Basel Duke	6434
Orphan	by Lord Napier	4117
Red Mollie	by John O. Gaunt	3030
Amelia Cunningham	by Fortunatus	1564
Bertha	Scioto	949
Mary	by Prince Albert 2d.	857
Mary	by Cossack	(3503)
Judith Clark	by Goldfinder	(2066)
Imp. Young Cary	by Jupiter	(2170)
Mary	by Saladin	(1417)
Lucy	by Meek's Bull	(2288)

This is to certify, That the above pedigree has been recorded in Vol. 69 on page 767. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*
Clerk F."

277 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.

Name, Lavinia.
Color, Roan. Calved Dec. 2nd, 1905.
Bred by Tebo Land & Cattle Co.; P. O., Clinton, Mo,
Owned by Harriman Bros.; P. O., Pilot Grove, Mo.

		(Sire's Number.)
(Vol. 53, p. 588.) Got by	Choice Goods	186802
Out of Lavender of Tebo Lawn by	Collunie	135022
Lavender of Hill Farm 15th. by	Lavender Las	119937
Lavender of Hill Farm 8th. by	Golden Rule	98268
Lavender of Hill Farm 2d. by	Golden Chief	69916
Lavender of Oakland 2d. by	Proud Duke	36660
Imp. Lavender 31st. by	Barmpton	45246
Lavender 20th. by	Pride of the Isles	(35073)
Lavender 12th. by	Count Bickerstaffe 2d.	(25838
Lavender 8th. by	Bryan Boro	(17440)
Lavender 7th. by	Friar Tuck	(14578)
Lavender 3d. by	Eclipse	(10186)
Lavender 2d. by	Queen Roan	(7385)
Lavender by	Will Honeycomb	(5660)
by	Spectator	(2688)
by	Albion	(1619)
by	Lancaster	(360)
by	Son of Windsor	(698)
by	Comet	(155)

Vol. 66 on page 739. In testimony whereof, I have affixed the seal

This is to certify, That the above pedigree has been recorded in of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*
Clerk F."

278 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.

Name, Roan Osa.
Color, Roan. Calved April 3, 1898.
Bred by J. J. Littrell; P. O., Sturgeon, Mo.
Owned by

		(Sire's Number.)
(Vol. 40, p. 701.)	Got by Prince Rupert	104945
Out of Osa	by Victoria Baron	105859
Orphan 7th	by 5th Royal Ravenswood	44890
Orphan 5th.	by Speculation	27933
Orphan 3d.	by John Morgan	8427
Orphan 2d	by Basil Duke	6434
Orphan	by Lord Napier	4117
Red Mollie	by John O. Guant	3030
Amelia Cunningham	by Fortunatus	1561
Bertha	by Scioto	949
Mary	by Prince Albert 2d.	857
Mary	by Cossack	(3503)
Judith Clark	by Goldfinder	(2066)
Imp. Young Mary	by Jupiter	(2170)
Mary	by Saladine	(1417)
Lucy	by Meek's Bull	(2288)

This is to certify, That the above pedigree has been recorded in Vol. 48 on page 410. In testimony whereof, I have affixed the seal of the Association.
Chicago, Ill., Aug. —, A. D. 1908.
[SEAL.] JOHN W. GROVES, *Secretary.*
Clerk F."

279 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.

Name, Mount Vernon Butterfly.
Color, Red. Calved March 20th, 1898.
Bred by W. H. H. Stephens; P. O., Bunceton, Mo.
Owned by W. P. Harriman & Son; P. O., Pilot Grove, Mo.

		(Sire's Number.)
(Vol. 36, p. 899.)	Got by Red Butterfly	109704
Out of Miss Bates 2d. of Monte-rey	by 17th Duke of Barrington	85626
Miss Bates 17th.	by 7th Duke of Oneida	14056
Miss Bates 10th.	by Chilton Duke	45611
Miss Bates 5th.	by Baron Bates of Seneca	7532

Lady Bates 2d.	by Duke of Airdrie	(12730)
Lady Belle 3d.	by Eli Hakim	(15948)
Imp. Felbert	by 2d Cleveland Lad	(3408)
Felicia	by 4th Duke of Northumberland	(3649)
Fanny	by Short Tail	(2621)
Fletcher 2d.	by Belvedere	(1706)
Fletcher	by Son of Young Wynyard	(2859)

This is to certify, That the above pedigree has been recorded in Vol. 47 on page 325. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*

Clerk F.

280 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Bull.

Name, Golden Scotchman. 271736.

Color, Red. Calved March 20th, 1906.

Bred by Harriman Bros.; P. O., Pilot Grove, Mo.

		(Sire's Number.)
(Vol. 46, p. 373.) Got by Golden Crown		217446
Out of Daisy Waterloo 16th.	by Scotch Minister	117294
Daisy Waterloo 2d.	by Grand Duke of Airdrie	86800
Daisy Waterloo	by Grand Duke of Waterloo	51878
Miss Daisy	by Royal Monarch	33794
Minnie 2d.	by Red Chief	27624
Lena	by George	23270
Rose	by Closter	23299
Ada 2d.	by Malcolm	10436
Ada	by President 2d.	835
Flora	by Prince Albert	847
Adelaide	by Rantepole	885
Imp. Arabella	by Victory	(5565)
Sally	by Major	(2252)
Old Sally	by Grandson of Favorite	(252)
	by Punch	(531)
	by Hubbock	(319)

This is to certify, That the above pedigree has been recorded in Vol. 69 on page 327. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*

Clerk F.

281 American Short-horn Breeders' Association.

Certified Copy of Pedigree Recorded in the American Short-horn Herd Book.

Cow.

Name, Fennel Duchess of Thistlewood.
Color, Red; white marks. Calved March 15th, 1898.
Bred by John Creswell; P. O., Bonaparte, Iowa.
Owned by W. P. Harriman & Son; P. O., Pilot Grove, Mo.

			(Sire's Number.)
(Vol. 40, p. 931.)	Got by Thistlewood		95417
Out of Fletcher 42d.		by Duke of Vermillion	80443
Imp. Princess 7th.		by 2d Duke of Rowley	45260
Princess		by 2d Duke of Wetherby	(21618)
Fennel Duchess 5th.		by 13th Duke of Oxford	(21604)
Fennel 3d.		by Cherry Duke 2d.	(14265)
Fennel		by 5th Duke of York	(10168)
Felbert		by 2d Cleveland Lad	(3408)
Felicia		by 4th Duke of Northumberland	(3649)
Fanny		by Short Tail	(2621)
Fletcher 2d.		by Belvedere	(1706)
Fletcher		by Son of Young Wynyard	(2859)
		by Descended from J. Brown's Red Bull	(97)

This is to certify, That the above pedigree has been recorded in Vol. 47 on page 325. In testimony whereof, I have affixed the seal of the Association.

Chicago, Ill., Aug. —, A. D. 1908.

[SEAL.] JOHN W. GROVES, *Secretary.*

Clerk F.

282 JOHN CRESWELL testified by Deposition for defendant as follows:

Answers to Direct Interrogatories.

My Name is John Creswell. I am forty-seven years old. My residence is near Hillsboro, Iowa, and by occupation I am a farmer and stock raiser. I have had experience in handling short horn cattle. I have been breeding them for thirty years. I have sold 1500 to 2000.

I owned Fletcher 42nd, the mother of the cow named Fennel Duchess of Thistlewood. I sold her to a man named Wallace of Bunceton, Mo., about January or February, 1898. I had owned her about three years. She was with a calf at the time I sold her, and the cow named Fennel Duchess of Thistlewood was the calf. I also owned the sire of Fennel Duchess of Thistlewood. This sire's name was Thistlewood.

Assuming that said cow named Fennel Duchess of Thistlewood had the pedigree above outlined and that she was in good sale condition, in my opinion her actual intrinsic value as a short horn animal the last of January or first of February, 1907, was about $125.00.

As answered heretofore, I sold the cow Fletcher 42nd, which cow was the mother of said Fennel Duchess Thistlewood, to a man by the name of Wallace of Bunceton, Mo., about January or February, 1898. She was sold in a bunch and no value was fixed upon her individually. The bunch was sold as a bunch. If the information given in the pedigree is correct, said Fennel Duchess of Thistlewood in January, 1907, was nearly nine years old.

283 Cows are at their prime at about seven years of age, and about that time begin to go the other way. They start down then. After that they do not find a ready market. Buyers do not want high bred cows over seven years of age. After that age there is no market for cows as breeders.

In my opinion said Fennel Duchess of Thistlewood had in January, 1907, a market value of about $125.00. There would be little difference in the market value of such cattle in the states of Iowa, Missouri and Texas. Men experienced in the handling of fine cattle can form an opinion as to the value of such cattle from their pedigree. The pedigree indicates the breeding and largely determines the value.

Answers to Cross-interrogatories.

At times animals of the same pedigree vary quite largely in value. If full sisters or full brothers are properly handled they are not likely to vary much in their market value. The only way to know the exact value of a thoroughbred short horn animal is to know both the pedigree and the animal, but from the pedigree alone a very good estimate of the value can be made, especially when one is familiar with the public sales of such animals as I have been.

(Deposition taken before W. F. Kopp, notary public, on the 12th day of January, 1909.)

F. M. MARSHALL testified by Deposition for defendant as follows:

284 *Answers to Direct Interrogatories.*

My name is Flemming M. Marshall; age thirty-four; residence Blackwater, Cooper County, Missouri. My occupation is that of farmer and feeder, shorthorn breeder, lumberman and banker. (Witness was shown copies of the pedigrees of the twelve head of cattle.) I am familiar with such cattle or breed, having had thirteen years' experience in breeding, raising, selling and buying the breed of cattle mentioned. I have bought a good many cattle of this strain and sold them in a scalping way you might say, and during

my life have handled about fifteen hundred head of pure shorthorns.

I have bought and sold cattle of this breed every year for the past thirteen years, and have seen during that time probably five thousand head bought and sold in the auction ring and at private treaty. I have noticed this specially for the reason that I was interested in the raising, buying and selling such cattle.

Yes, I do know the market value of such cattle if they were of the pedigree stated above and of average individual merit, but not having seen the cattle and am not familiar with the individual merit of the cattle mentioned here, I could not state their value, only averaging the values received for the different families represented here.

There is not a specific market value for cattle of this kind like in beef cattle, yet there is an approximate market value, except in a few superior show cattle, whose market value would depend upon the number of people wanting them and the competition displayed thereby. The value is arrived at according to the individuality and breeding.

285 I know approximately the value of this kind of cattle at the time they were said to have been killed. I have an opinion, based upon the average value of such cattle at the time they were alleged to have been killed. I have seen the bull Golden Crown and looked him over when he was a yearling. I will mention the market value of these cattle as near as I could state it. The bull Golden Crown, I would judge him to be worth about two thousand dollars, from his individual merit and the family from which he comes.

I will name the value of the cattle mentioned here as best I can from the following answers:

Golden Crown; judging from the family from which he comes and his individual merit, would place him at about two thousand dollars.

Lavinia. She represents one of the best families known to the breed, and from what I have heard of this heifer, would value her at six hundred dollars.

Scotland's Beauty. If she was of average quality, representing the family she does, would value her at $250.00.

Roan Osa. This cow is of popular breed, but has practically passed her days of usefulness. Admitting her to be of average quality, would place her at $160.00.

Mt. Vernon Butterfly 2nd is of a popular family also, though not a fashionable one. Considering her age, and to be of fair quality, I would value her at $150.00.

Golden Scotchman comes from a good family noted for their individual merit, and if he is of average quality, would value him at $550.00.

Fennel Duchess of Thistlewood. I have owned a great many of this family, and the average value of same has been about $125.00.

286 Golden Block. Judging from the family from which he comes, unless he is able to demonstrate his superiority in the show ring, would value him at $240.00 or $250.00.

Royal Crown. I think I saw this animal as a calf. If I am right and he has developed as he should, he would be worth about $300.00.

Golden Thistle descends from the reliable family noted for transmitting their good qualities. While few of them have obtained show yard excellence, hence I would place his value at $250.00.

Golden Bessie descends from the famous Butterfly tribe, and I think the average price of this family would be about $500.00.

Golden Acorn comes from one of the good Scotch families also, and from my experience the average price of them has been about $500.00.

The above answers are based upon experience in buying and selling such cattle, and the value of the particular cattle described here might be higher or lower, according to their quality and condition.

In the above answers I took into consideration that these were all good cattle and in good condition. The values given above are, I consider, fair values, for the reasons stated above. The figures given above do not represent full values, but approximate values and are reasonable estimates. The reasons for my estimates were based upon the general value of such cattle and of such breeding granting they were of average or a little above the average in individual excellence.

287 *Answers to Cross-interrogatories.*

My testimony is based upon a knowledge of the pedigrees of the cattle exhibited here. It is a fact that it frequently happens that two animals bred exactly alike with the same opportunities one will develop into a very valuable animal and the other will be only a common place animal. A Scotch Shorthorn which has demonstrated itself to be a successful show animal would have a market value three to five times as great as another animal similarly bred but lacking in show qualities.

Assuming that the five animals, the bull Royal Crown, and the four heifers, Lavinia, Golden Bessie, Golden Acorn and Golden Thistle, comprised a breeder's young show herd, and that these cattle were in prime show condition highly fitted and ready to show in the most important shows of the country. These facts would give to such a herd a vastly increased value over what similar animals would have separately when not comprised in such show herd.

Assuming that Golden Crown was a shorthorn bull weighing 2100 pounds at three years of age; that he was extremely well bred in the most fashionable Scotch lines, sired by a great imported bull and out of a great imported cow, that he was a superb individual, possessing all of the rare beauty, characteristics and show yard qualities of a grand champion show bull; and assuming further that he had already demonstrated at this early age that he was a uniform sire of superb show cattle, I would think that from $4,000 to $5,000 would be a reasonable value for such an animal.

(Deposition taken before John S. Underwood, Jr., notary public, on the 20th day of January, 1909.)

288 E. M. HALL testified for defendant by deposition as follows:

Answers to Direct Interrogatories.

My name is E. M. Hall; age thirty-one years; residence Hallwood Farm, near Carthage, Missouri; occupation, breeder of short horn cattle.

(Witness is shown copies of pedigrees of the twelve head of cattle.) I have been engaged in the short horn breeding business for eleven years, last past, and I am more or less acquainted with all strains of short horn cattle. I have owned short horn cattle carrying same blood lines as Golden Scotchman, Scotland's Beauty, Lavinia, Roan Osa, Golden Crown, Golden Bessie and Royal Crown. I am more or less familiar with the other cattle by their respective pedigrees, having seen the same at shows and sales at various places in the states of Missouri, Kansas and Illinois.

I have sold, both at private and public sale, a great many short-horn cattle. I have bought at both private and public sale a number of short horn cattle, and they include those specially named in my answer to interrogatory above.

I would know the reasonable value of such cattle upon the inspection of the individual animal and the pedigree thereof. In every instance I would require an inspection of the individual animal to place a value on the same, as well as an inspection of the pedigree, before purchasing. I could give, from my experience in handling such cattle, a reasonable estimate of the market value thereof from the pedigree and on the assumption that they would average among that class of cattle.

289 I do not state that there is no market value for such cattle, for the reason that there are a great many short horn breeders of the class of cattle described in the interrogatories, and there is always a market for such cattle among such breeders.

I think I have an opinion of the reasonable worth or intrinsic value of these cattle at the time that they were alleged to have been killed.

The bull Golden Crown, No. 217446, I have seen. I have seen and examined this bull on several different occasions, namely: The Missouri State Fair and the Oklahoma Fair. I saw him win Championship at Oklahoma. I also knew of the very high value placed in this bull as a show bull and as a sire by Messrs. Harriman.

Golden Scotchman I never saw. I never saw Lavinia, but have seen her mother. I never saw Roan Osa, nor Mt. Vernon Butterfly nor any of the rest of the cattle mentioned in the second interrogatory (referring to cattle whose pedigrees are copies above).

From my knowledge of the pedigree of e of said animals and from my observation and experience with short horn cattle and with the market for same, and with my knowledge of the class of cattle shown by Messrs. Harriman Brothers, I would place the reasonable value of said cattle as follows:

Golden Crown, $2500.00; Golden Scotchman $400.00; Scotland's Beauty $300.00; Lavinia, Yearling heifer, $1000.00; Mt. Vernon Butterfly 2nd $200.00; Roan Osa $200.00; Fennel Duchess of This-

tlewood $200.00; Golden Acorn, calf, $350.00; Golden Bessie, calf, $350.00; Golden Thistle $250.00; Royal Crown, yearling, $400.00; Golden Block, calf, $350.00.

290 I have answered the ninth interrogatory in my answer to the eight-, except that I might add that this valuation is placed from a study of the pedigrees, without seeing the individuals, with the exception of Golden Crown. Should further data be at hand or an inspection of the cattle possible, the valuation might easily have been varied.

In answer to the tenth interrogatory, will say that I have taken into consideration the condition of the cattle as set forth in said tenth interrogatory to the effect that Golden Crown, Lavinia, Golden Acorn, Golden Bessie, Golden Thistle and Royal Crown were show cattle and in good show condition, and the remainder of said cattle, to-wit: Golden Scotchman, Scotland's Beauty, Roan Osa, Mt. Vernon Butterfly 2nd, Fennel Duchess of Thistlewood, and Golden Block were sale cattle and in good condition for sale, and placed my valuation as above given accordingly.

I would say that my estimates were conservative; that to have placed a lower valuation on the cattle would hardly be possible, knowing the condition and reputation held by Harriman Brothers' cattle, while, should marked individualit- have been shown, the estimate might have been much higher.

Answers to Cross-interrogatories.

I have so stated that my testimony is based on a knowledge of the cattle as exhibited by said pedigrees and not from a personal knowledge of these cattle, with the exception named.

It is a fact that it frequently happens that two animals bred exactly alike with the same opportunities one will develop into a very valuable animal and the other will be only a commonplace animal, but such a condition is the exception rather than the rule. The basis of our business is that "like produces like."

291 It is a fact that a show animal is a great deal more valuable than a similarly bred animal without show-yard qualities.

Assuming that the five animals, the bull Royal Crown, and the four heifers, Lavinia, Golden Bessie, Golden Acorn and Golden Thistle, comprise a breeder's ~~young~~ show herd, and that these cattle were in prime show condition highly fitted and ready to show in the most important shows of the country, I think it is true that these facts would give to such a herd a vast increased value over what similar animals would have separately when not comprised in such show herd.

5th Cross Interrogatory. Assuming that Golden Crown was a shorthorn bull weighing 2100 pounds at three years of age, that he was extremely well bred in the most fashionable Scotch lines, sired by a great imported bull and out of a great imported cow, that he was a superb individual possessing all the rare beauty, characteristics and show yard qualities of a grand Champion show bull; and assuming further that he had already demonstrated at this early age that he

was a uniform sire of superb show cattle, would not Five Thousand Dollars be a reasonable value for such an animal?

Answer to 5th Cross Interrogatory. Such prices as that are not uncommon for animals such as described in Cross Interrogatory No. 5, but, in my opinion, Golden Crown, does not justify the assumptions involved in the question.

I was in attendance upon the State Fairs at Topeka, Hutchinson, Kansas, St. Joseph and Sedalia, Mo., during the fast fall.

It is true that at the shows above mentioned I saw the herd of Harriman Bros. in competition with other cattle and that
292 their show herd was a number of the get of the bull Golden Crown, and it is true that a number of premiums were awarded to them.

(Deposition taken before Iva Cook, notary public, on the 16th day of January, 1909.)

N. H. GENTRY testified by Deposition for defendant as follows:

Answers to Direct Interrogatories.

My name is N. H. Gentry; age fifty-eight; residence Pettis County, Missouri, within six miles of the city of Sedalia, and my occupation is farmer and breeder of fine stock. (Witness is shown pedigrees of the twelve cattle.) Yes, I have dealt in, bred, raised and handled the breed of cattle mentioned in the pedigree, all of which are short horn cattle. I have been engaged in this business nearly all of my life and am still engaged in the same business. In addition to this experience I have judged Short-Horns at a number of National Exhibitions and State Fairs.

I have bought and sold and seen bought and sold this kind of cattle, both at public and private sales, nearly all of my life. The reason that I particularly noticed this kind of cattle was that I was in this same business and had been dealing in that class of cattle nearly all my life.

I know the reasonable price or value of this kind of cattle, and I also know what this breed of cattle would bring on the market if offered for sale. I know the reasonable market value of this kind of cattle, and I know the reasonable market value at the time they are said to have been killed. There is a market value for this
293 kind of cattle, as they are being bought and sold all the time at both public and private sale.

I know and have an opinion as to the value of this kind of cattle at the time they were alleged to have been killed. I have an opinion of their reasonable worth or intrinsic value at the time that they were alleged to have been killed.

Golden Crown is the only one of the animals I have seen enough to remember him.

The reasonable market value of each one of the above named animals at the date they were alleged to have been killed, at the nearest place, or at any place where they had a market value, was as follows:

Golden Crown $2500.00; Golden Scotchman $350.00; Scotland's Beauty $250.00; Lavinia $750.00; Roan Osa $200.00; Mount Vernon Butterfly 2nd. $200.00; Fennel Duchess of Thistlewood $200.00; Golden Acorn $500.00; Golden Bessie $500.00; Golden Thistle $250.00; Royal Crown $250.00; Golden Block $250.00.

In my answer to the last above interrogatory, I have stated what I regard as the moderate cash value of each one of the animals named at the time they were killed, but not having had the opportunity to examine them individually, these values are, of course, considerably guessed at from experience. From the fact that they were being shipped to a leading live stock show by an experienced breeder and shipper, I would naturally presume that they were animals of high order of merit and in show condition, both of which would add materially to their cash value. I judged the Harriman show herd of 1908 at the Kansas State Fair at Hutchinson, and also at the St. Joseph, Missouri, Live Stock Exhibition, and awarded to this herd several first and lesser prizes, a good part of which were the get of Golden Crown. The superior quality of his get that
294 I examined in these two shows gives me a high opinion of his value as a stock bull, and I therefore consider that $2500.00 is a very moderate price to place upon him.

I will state the values I have placed on the cattle I consider moderate values, and if they had lived and proven successful winners at the shows, this of itself would have added materially to their value. In other words, animals after winning at the leading shows are considered more valuable than they were before being shown.

Answers to Cross-interrogatories.

It is a fact that my testimony is based on a knowledge of the cattle as exhibited by said pedigrees and not from a personal knowledge of these cattle, with the exception of Golden Crown. I might add that my opinion is based also upon the fact that these cattle were being taken to a leading show by an experienced owner and herdsman, who would not start out with a show herd unless they thought them good enough to win at least a part of the premiums for which they were to be shown.

It is a fact that it frequently happens that -wo animals bred exactly alike with the same opportunities, one will develop into a very valuable animal and the other will be only a commonplace animal.

It is a fact that a Scotch Shorthorn which has demonstrated itself to be a successful show animal would have a market value three to five times as great as another animal similarly bred but lacking in show qualities.

Assuming that the five animals, the bull *Royal* Crown, and the four heifers, Lavinia, Golden Bessie, Golden Acorn and
295 Golden Thistle, comprise a breeder's young show herd, and that these cattle were in prime show condition highly fitted and ready to show in the most important shows of the country, it is true that these facts would give to such a herd a vast increased value over what similar animals would have separately when not comprised in such show herd.

Never having made a critical examination of Golden Crown, I am hardly prepared to state that I think he was worth $5,000.00, and yet it is not at all unreasonable to assume that he was worth that much. Everything assumed in this interrogatory: that is, that he was a shorthorn bull weighing 2100 pounds at three years of age, that he was extremely well bred in the most fashionable Scotch lines, sired by a great imported bull and out of a great imported cow, that he was a superb individual possessing all of the rare beauty, characteristics and show yard qualities of a grand Champion show bull, and that he had already demonstrated at this early age that he was a uniform sire of superb show cattle, would have to be true to make him worth that amount of money.

It is a fact that I have been employed as a judge of cattle at a number of the important Fairs of the country the past few years.

It is a fact that at the State Fair at Hutchinson, Kansas, and St. Joseph, Missouri, I awarded a number of prizes to Harriman Bros.; young shorthorns that were the get of the bull Golden Crown.

(Deposition taken before H. D. Muir, notary public, on the 23rd day of January, 1909.)

296 WALTER PEDEN testified by Deposition for defendant as follows:

Answers to Direct Interrogatories.

My name is Walter Peden. I am forty-one years old. Spencer, Indiana, is my residence. I am a farmer and breeder of pure bred live stock.

I have had several years' experience in breeding, buying and selling pure bred cattle and pure bred horses as well as other stock.

(Witness is shown copies of pedigrees of the twelve cattle.) I have seen and known personally something about the animal described in the first pedigree as Golden Crown 217446, our firm, Peden Brothers, having once owned it. So far as I know, this is the only one mentioned in these pedigrees that I have personally seen. The pedigrees of the remainder of these animals are so imperfectly set forth that I can not identify them.

Our firm, Peden Brothers, once owned the bull Golden Crown 217446. We bought the animal at a public sale of the property of one Ed Donanue of Iowa, about the 19th day of November, 1903, and we owned the same until March, 1905, when we sold it to Harriman Brothers of Missouri.

When we sold the animal Golden Crown 217446, we sold with him three other animals. None of these three appear in the pedigrees here exhibited. In negotiating this sale, our firm fixed a price on each animal, but the buyer refused to accept our offer and made us an offer of a lump sum for the four. We accepted this lump offer and cannot therefore state what price either party fixed as the price

of any one of these four animals. We bought this animal
97 Golden Crown at the Donahue sale, as stated above, as a calf, not weaned, along with its mother, paying a lump sum for he two. No separate price was fixed for the calf.

Answers to Cross-interrogatories.

This animal Golden Crown had an excellent Scotch pedigree. It a fact that when we sold the bul- Golden Crown to Harriman Bros. we also sold other animals not mentioned in the direct nterrogatories and whose pedigrees are not set out or attached to he direct interrogatories.

It is a fact that we sold to Harriman Bros. the bull Golden Crown vith other cattle for a lump sum, and that there was no specific nd separate value of each different animal.

It is a fact that we sold the bull Golden Crown to Harriman Bros. as a yearling. He was past one year old and under two and vas sold as a yearling.

Assuming that after the sale of the bull Golden Crown to Harriman Bros. that he had received such care and attention as a prudent nd careful breeder would have bestowed upon him, I answer that nder ordinary circumstances he would be of a greater value on the 30th day of January, 1907, than at the date of the sale by us to Harriman Bros. Of course there might have been something of unavorable kind that might have unfavorably affected his value.

I have been connected, along with my grandfather, father and rothers, with the breeding of and dealing in pure bred cattle since ny earliest recollection. We first introduced the pure bred Scotch cattle into our business in the year 1902, buying cattle that
98 had been imported from Scotland. We have kept up our herd of this class of Scotch bred cattle, which runs from four to ten head, by breeding and buying to replace sales. Our entire herd of pure bred cattle runs from forty to sixty head. We have used great care in selecting the choicest families and individuals and I have made constant effort to keep well informed as to the values and prices of this the Scotch class of cattle, as well as of other breeds.

The pedigree of Golden Crown ranks favorably with the best of the Scotch pedigrees and has an excellent reputation among the breeders of Scotch cattle. I think that with proper care and treatment he should have developed into an extra fine animal.

Assuming that this bull Golden Crown had developed into a grand Champion Show Bull, it is a fact that his value would have been far more than at the time of the sale by us to Harriman Bros.

Assuming that this bull Golden Crown had developed into a superb animal possessed of the rare beauty and show yard qualities and characteristics of a Grand Champion Show Bull, and in addition thereto had already demonstrated at this early age (January 30th, 1907) that he was a uniform sire of superb show cattle, in my opinion his fair cash market value at said date would have been from $2,000.00 to $2500.00.

We parted with this bull when he was quite young and we had bred him to but one pure bred cow. The result of this breeding was a bull, now a three year old, that has proved a prize winner at our state fair and several other fairs in the state.

(Deposition taken before Eph W. Sassady, Clerk of Owen County Circuit Court of Indiana, on the 9th day of January, 1909.)

299 Judge HEAD: We offer this part that was ruled out the other day of Mr. Albert Harriman's deposition:

"The agent at home knew that we had show cattle and where we were going, and I had talked to him before about it. But I had said nothing to him about these particular cattle.

"In the contract which I made with the railroad company, defendant, pertaining to the shipment of these cattle, I think the value placed upon these cattle in that contract reads as follows: The four bulls were valued at $30.00 each, totaling $120.00 for the bulls, and the nine cows were valued in that contract at $20.00 each, making a total of $180.00. I signed that contract. I did not state to the agent Hunter, at Pilot Grove, at that time that that was the value of these cattle."

Judge WOLFE: I suppose we should have stated to the jury that this is cross examination of Mr. Harriman, the partner of the Mr. Harriman here.

Plaintiffs offer the following of Mr. Harriman's cross examination:

"I don't know how these values happened to be written in the contract. The agent did not inquire of me as to the value of this live stock. I did not know that the railroad company charges a higher rate for shipments of high grade and valuable cattle than it does for cattle of ordinary value."

300 HERBERT MORRIS, being sworn and introduced as a witness for defendant, testified as follows:

Direct examination by Judge HEAD:

My name is Herbert Morris. In January, February and March, 1907, I was what was called the traveling freight claim agent for the M. K. & T. (Witness is handed a letter.) This letter came to my hands as freight claim agent of the M. K. & T. This letter is dated January 14th, 1907. It was evidently intended for February 14th, as the wreck in which the cattle were killed occurred on January 30th. (Witness is asked to read letter as a basis for the examination.)

The letter is headed "Mt. Vernon Park Herds of Scotch Shorthorns and Poland Chinas. Harriman Bros. proprietors. Pilot Grove, Missouri, January 14th, '07. Mr. A. A. Krause, St. Louis, Missouri. Dear Sir: I regret very much to have to call your attention to the fact that in the awful wreck which occurred on your road at Deerfield, Missouri, February 30th, we lost a car load thirteen

head of very valuable show and breed cattle, including our herd bull and all of our splendid young show herd. Will you kindly advise me at your earliest convenience what action your company will wish to take in the matter and greatly oblige, Yours truly, R. L. Harriman."

P. S.—The records will show that Harriman Bros. have been good friends and good customers of the Katy. Won't you do us the kindness to call on us yourself and let's go over the matter like friends. I will be at home only on the 24th. of this month and March 4th. I hope you can arrange to be here one of those days."

301 A. A. Krause, to whom that letter was addressed, was what was known as General Claims Attorney of the M. K. & T. at St. Louis. That letter was turned by him over to me through the head of my department. On February 24th, after this letter was turned over to me, I went to Bunceton, Missouri. I drove over there and met Mr. R. L. Harriman and had a conversation with him regarding this matter. After I met Mr. Harriman and the usual course of courtesies were over, I told him I had driven over there from the M. K. & T. and was in a hurry to get back. It was one Sunday. I told him in fairness to him it would be proper to state that it would be necessary for him to file a claim with the company. He asked me what I wanted, etc., and I told him I wanted a list of the animals that were killed; that it would be impossible for us to make a full and fair investigation as to their values until I had this. Finally, without going over the preliminaries—of course it would be impossible for me to remember all I said and all he said—finally we adjourned to a bank, the name of which I don't know, and Mr. Harriman produced forth a paper. He had two papers giving a list of these animals. I finally explained to him that it would be necessary for me to have one of those lists, which he finally gave me and I left. Later than that something occurred with reference to that paper he delivered to me. (By appointment I met Mr. Harriman at a hotel in Sedalia, Missouri. I am trying to think of the name of that hotel.

302 There are two there. There is one called the Huckings. It was the Antlers I guess. I go to so many hotels I can't remember them. I met him by appointment at the Antlers Hotel. I was at the M. K. & T. office and was informed that Mr. Harriman was there and was in a hurry and wanted to see me right away and I went over there. I met Mr. Harriman in the hotel and there was a Mr. Miner present who was traveling passenger agent of the M. K. & T. and a man I was introduced to as Mr. Harriman's brother. It was my understanding he was his brother. We were all four in a room of the Antlers Hotel. After dismissing Mr. Miner, Mr. Harriman made a statement to me. He said "I would like to know if you have that paper I gave you when you were over at Bunceton." I said "Yes, I have all the papers pertaining to this matter." He said "My memory isn't good on that matter and I would like to have the matter refreshed." I said "Very well." I didn't suspect what Mr. Harriman was go-ng to do at that time. I am a little left handed and have a habit of holding my papers in my hand like this. He was on one side of the table and

I had been sitting in a chair near the table and I walked over near the table and handed them to him like this. He made a pretense of looking at it like this and before I could say anything, he just made a grab and snatched this paper out of the file of those papers. Of course I became very much annoyed. I was absolutely unarmed or he wouldn't have snatched them. I didn't suspect any thing. I supposed that Mr. Harriman was a business man and would treat anybody courteously. Of course I didn't suspect anything. My purpose was to re-take the paper, but there was a large mirror back of where Mr. Harriman was standing and I saw his brother move up towards me and I immediately saw he had me at an advantage and I kept my temper. I didn't say anything—out of the way I mean.

I didn't say any cuss words like I felt like saying. I kept my
303 temper, and I said, "Mr. Harriman, if that is your game, I want to notify you as representative of the M. K. & T. that you have withdrawn your claim. I have absolutely nothing on which to base it." I finally withdrew. The claim was not afterwards presented to me.

Cross-examination by Judge WOLFE:

I had no cannon with me on that occasion and had no shot gun; had nothing of that kind. I am a Texan and if I had had, I think I would have been there to get the paper back. I am not ashamed of my nationality.

I took out my papers there, all the papers pertaining to the case. I had a little file of papers such as is usual and customary in making some investigation, etc., as to the cause of a wreck. I couldn't be positive about how many papers I had. It was a file about that thick, twenty-five or thirty sheets; probably more than that. Those were the papers pertaining to the investigation of this matter with which I had this paper that Harriman had given me at Bunceton. All those papers pertained to that case. I could say that this case has been under my particular charge. Yes, sir, it has. I have interviewed and talked with a great many stock men relative to the value of these cattle. I endeavored to make a fair investigation as to the values. I have been in different states investigating. To the question "Q. You were there at Sedalia for the purpose of trying to settle this claim with Mr. Harriman, weren't you?" I can't answer either yes or no without an explanation. The question conveys a double question. I would have to say 'yes' and 'no' both. I would have to tell the purport of my being there. Mr. Harriman had been telegraphed to meet me in Sedalia. Possibly I sent that

telegram. I either sent it myself or was advised by my
304 superiors and told to go and meet him. I am inclined to think I sent it myself. I think that telegram was sent to him at Bunceton, Missouri. I don't know whether he was out in Kansas at that time or not. Possibly he told me there that the telegram was repeated to him from Bunceton and he came there to meet me. The suggestion had been made that we would meet at Sedalia when I left him at Bunceton by him; that it would be more convenient for him to meet me there owing to the fact that he was

traveling quite a good deal. That question was discussed. It was mutually agreed that we would meet there. When Mr. Krause got that letter, the letter was turned over to me, and I came up to Bunceton. I went to Bunceton for the purpose of meeting Mr. Harriman and receiving this claim. I wanted to make an investigation into it. That is what I was there for. I knew of the wreck long before that letter, and I knew all the circumstances surrounding it. I knew the cattle had been killed. I supposed they belonged to Harriman Brothers. I was told so. I understood they were shipped from Pilot Grove. I understood by hearsay the character of stock that were killed. When a claim man hears about the character of stock killed, they are always thoroughbred Jerseys when they are crushed under locomotives. I was there when the stock were pulled out of the wreck. No, I didn't know they were not thoroughbred Jerseys crushed by locomotives. I couldn't tell; they were so badly disfigured. They did not look like Jerseys crushed by a locomotive. I knew they were not Jerseys. I knew they were not crushed up with a locomotive. I knew they had been in a railroad wreck. I knew they had gone through a bridge. There was not any information with reference to the happening of that accident or the fact that it had happened or the fact
305 that the stock was killed that I wanted from Mr. Harriman or needed to investigate this claim; not that class of investigation. I wanted to know the names of the animals. Mr. Harriman told me that they were very highly bred animals. Mr. Harriman hadn't told me anything at the time I went to Bunceton on the 24th day of February, 1907. On the 24th day of February, and prior thereto I needed the information as to where the cattle were going from and to properly investigate this claim. I didn't say I had that. All I knew about the wreck was what I had heard. I knew of the wreck. I had heard of the wreck. I had been there and seen the cattle. I knew the cattle had been killed. I knew they were cattle in the hands of the railway company for transportation. I knew that they were Harriman Bros.' cattle. I knew that the railway company had in its possession all the information necessary to show from and to what points they were shipped. Duplicate bills of lading are always held by the railway company, but I had to go there to get that duplicate bill of lading; had to go to Pilot Grove. They don't send those in. They are kept in a book. The duplicates are retained there by the agent. I didn't have to see Harriman to get that. All that Harriman could have informed me about in this case was to give me the names, numbers and pedigrees of these cattle, and their values as he claimed. If you were going to pay for anything, wouldn't you want to know what the values were? The values were nominated in the contract at $30.00 for the bulls and $20.00 for the cows. I had not valued them. I knew they were valued in the contract when I saw the contract. I had been there at Pilot Grove before I saw Mr. Harriman; had been there many times. On Sunday the 24th day
306 of February I had been to Pilot Grove and then came over to see Harriman. I had already seen the contract. I knew

what the bulls were valued at and cows. I didn't need to see him to get the values. I wanted to know what character of stock Harriman claimed they were. That certainly made some difference to me even though the values were fixed in the contract. I had to see Mr. Harriman and report to headquarters what Mr. Harriman said and the character of contract that was signed. I wanted to see Harriman and see what he said about the values. He told me what he claimed. The only statement he gave me there was the paper I have mentioned. That was a statement of the animals. I am not going to testify about that paper. You show me the paper and I will tell you whether it is a brief statement in regard to the pedigree of each one or not. The memorandum that was put in my hands gave me the names of the animals killed. Without seeing the paper again I can't state whether or not it gave a brief statement of the pedigrees. There were values on the paper. I couldn't state who set the values. I think when Mr. Harriman gave me the paper that he told me that he had asked others as to the values and that those values were placed there by others. As to whether they were satisfactory to him or not, I don't know. I don't think he mentioned that. He did not tell me that the values fixed in there in some instances were higher on some animals than he fixed but on other animals they were not so high and that the aggregate amount was not what he conceived to be his loss.

March 9th was the date of the meeting in Sedalia. There was not an offer made there by me to Mr. Harriman to settle this claim. There was a tender made. Mr. Harriman never allowed me to get beyond a tender. After that the paper was taken away from me.

307 Sometime after Mr. Harriman took this paper away from me, I started to investigate this claim and visit stock men and get information and values of these cattle. I don't want to tell an untruth. I would simply have to estimate how long it was afterwards that I started it. If you want an answer to that question I would say inside of from sixty to ninety days afterwards. I continued to prosecute my investigation as to the character and value of these cattle. That is true.

Redirect examination by Judge HEAD:

The defendant has an agent at Deerfield. That is the closest place to this injury. It has a station agent at Nevada. I shouldn't think that was much over ten or twelve miles from where this occurred. It has an agent at Sedalia. It had an agent there at Pilot Grove. That is where the contract was made. It has agents all along up and down the line, station agents.

After that paper was taken, I went to Chicago and got the names of the cattle. No, I beg your pardon; I got the names furnished by Judge Head. That was after the suit was brought. I couldn't tell when the suit was brought. It was not brought in sixty or ninety days after I saw Harriman. The sixty and ninety days afterwards I was making investigation trying to find out the names. I knew the herd bull. I was making inquiries regarding the value of this herd bull within sixty to ninety days after I spoke about and I was

making inquiries of parties whom I thought would know the names of the other animals, which I wasn't able to find out until these gentlemen furnished me the names of the other animals, at which time I went to Chicago and got the pedigrees. Suit was not brought
308 until about May, 1908. I was over a year trying to find out the names of these animals. I never did find them out until I got them from Judge Head, except the herd bull. I had the claim in my grip trying to find out all I could, but I couldn't find anybody that knew these animals.

Defendant closes.

Judge WOLFE: I want to offer the memorandum written there on that letter; explanation of the date. We offer the memorandum of date made on this letter:

"J. L. West, R. R. A. A. Krause, 2/15/'07."

WM. HOUK testified for plaintiff- by deposition as follows:

Answers to Direct Interrogatories.

My name is Wm. Houk. My age is thirty-one years. My residence is Deerfield, Vernon County, Missouri. My occupation is farming at the present time. On the 31st day of January, 1906, I was residing in Deerfield, Vernon County, Missouri, and was engaged in chopping wood at that time.

I know about the happening of the accident in which plaintiffs allege that a shipment of cattle made by them over the defendant's railway was killed by reason of the car in which said cattle were being transported going through a bridge over Big Drywood Creek near the city of Nevada in the State of Missouri on the 31st day of January, 1907. I remember the occurrence and saw the train before the accident happened and was at the scene of the wreck after the accident.

309 At the time I first saw the train I was standing one half a mile east of Dry Wood Creek and just north of the M. K. & T. railroad track. I was working on the M. K. & T. railroad track as a section hand, on section forty-one. The train was actually going west, but in railroad terms we called it south. Myself and the rest of the section hands had just moved the hand car off of the track at the crossing when I saw the train. The train was about a half a mile from the place where the accident occurred. I was about a half a mile east of the bridge over Dry Wood Creek, where the accident happened.

I saw something unusual connected with the train of cars; that is to say, one of the cars on the said M. K. & T. railroad track had the brake beam down and dragging and was knocking the fire out of the rails of the railroad track when it passed me. I saw this condition of the car when the train was about even with me. My impression is that the car that had the brake beam down and dragging was about the center of the train. This was on January 31st, 1907, about one o'clock p. m. I saw and looked at the car that had the

brake beam down and dragging for about a quarter of a mile. I did not see the train go into Dry Wood Creek, but I heard the noise and I saw the cars in the creek about five minutes thereafter. With the other section hands I went to rescue the trainmen and those on the train. When I arrived, the east end of the bridge was knocked off the abutment and was in Dry Wood Creek. I examined the track and could see that the car with the brake beam down and dragging had jumped the track before it reached the bridge a distance of about seventy-five feet from the bridge. I afterwards examined the railroad track for about one-half of a mile east of where the accident occurred and could see that the brake beam had been down and drag-
310 ging all this distance. I did not examine the track any farther east.

R. L. HARRIMAN, being re-called as a witness for plaintiffs, testified as follows:

Direct examination by Judge WOLFE:

(Witness is handed a letter.) I have examined this letter. I wrote this letter. It is dated January 14th, 1907. I think the real date of the letter was probably a month later; ought to have been a month later. The wreck is spoken of as February 30th. Those kind of mistakes are liable to happen in my correspondence. I get home once a month sometimes and find a pile of letters to answer and have to work all night sometimes to answer them. That was the purpose of the letter, to advise Mr. Krause of it.

Mr. Morris testified that he came to see me at Bunceton. He did come to see me. He stated to me why — had came to see me. He said Mr. Krause sent him up there to see me to find out what our loss was and see if we couldn't come to a settlement. I showed him a memorandum or appraisement or statement as to the value of this stock made by other persons there. I gave that paper to him. When he told me he wanted to get at the correct idea of what we had actually lost and what the values were, I told him I had asked some neighbors of mine to list these cattle and appraise them, and I showed him this paper that contained a full list of the animals, gave their names and partial pedigrees and also the values the neighbors thought they were worth, and he said now that was just the kind of information he wanted and they needed and asked me to let him take it down to Mr. Krause. He was going to St. Louis and Mr.
311 Krause and Mr. West were both there, and they were the settling board as I understood, and he said "If you will let me take this down, I am sure we can settle this matter amicably and fairly. The company knows they killed your cattle." I let him have the paper reluctantly and said I didn't know whether I ought to let him take a paper with that much information, but I did, with the understanding that he was to take it to Mr. Krause and try to get a settlement with Mr. Krause out of court. He assured me that within ten days he would wait on me with a proposition to settle this loss. I don't know whether it was in ten days that he did it or not. I rather think it was. I was out in Kansas and Oklahoma making

sales and I received a telegram from my home office asking me if I could meet Mr. Morris in Sedalia on a certain date, and I did meet him there. It was a busy time for me. When I met him there there was an offer passed from him to me to settle. He brought witnesses along and made me a proposition to settle. Indeed I did not accept. He stated something to me as to whether or not that was a final proposition or the settlement was off. He said I could take that or nothing; that I wasn't entitled to anything. It was after he said that that I took this paper. I did not take that paper out of his hands. We were sitting around a table like this only larger, center table in the parlor in the Antlers Hotel. He had Mr. Miner with him. He and Mr. Miner were on one side and Bert and me on the other. After he made the proposition to settle, I said "Mr. Morris, if you have no further proposition for me, I am a pretty busy man, and I want to go." The papers were all out there. We had been looking over the papers and discussing them; not only this paper, but the contract and all the papers in the case.
312 I just picked up the bunch of papers and turned them over until I came to this one. "Now," I says, "Mr. Morris, I gave you this paper with the understanding and promise from you that you would take it down to Mr. Krause and show him our loss and try to get an amicable settlement." I said "now, since this has failed in the proposition, I think this belongs to me and I want you to consent to let me have it." He flew into a rage and nearly had a calf and I got a little hot too and I put the paper in my pocket.

Plaintiffs introduced in evidence the following from the Constitution of the State of Missouri:

"And the last previous rules of the Supreme Court on any question of law or equity, shall in all cases be controlling authority in said courts of appeals."

Plaintiffs introduced the following extracts from the opinions of the Courts of the State of Missouri as evidence to show the laws of that state:

George v. Chicago, R. I. & P. Ry. Co. (Southwestern Reporter, Vol. 113, page 1099, decided by the Supreme Court of Missouri, Division No. 1, June 29th, 1907):

The following is a portion of the opinion of the Court:

"Defendant introduced in evidence the bills of lading issued on these shipments, in each of which was this clause: 'Said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other consideration it is mutually agreed between the parties hereto, as follows.' Then follow stipu-
313 lations to the effect that carrier is not liable for any delay in transporting or delivering the stock, and that in case of any loss or damage the shipper must give notice in writing to an officer of the company or station agent before the stock is removed from the place of destination, and failure to give such notice shall be a bar to any suit; that in no event shall the company be liable for more than $10 for a hog lost; that the shipper is entitled to ride

only on the train with his stock and not to return passage, and that the contract is all to the shipper's own free will and desire. It is signed by the company's agent and the plaintiff. But there were blanks in the printed contract wherein it was intended, when such contract was really to be made, to insert the rate alleged to be a "reduced rate" in consideration of which the carrier was to be relieved of his common law duty. These blanks in these alleged contracts were not filled; there is no rate specified. There was no evidence to show what the rate was, other than the regular tariff. Kellerman v. Ry., 136 Mo. 177, 34 S. W., 41, 37 S. W. 828.

"In the count on the January shipment, after stating the delay in delivery at the point of destination and the damages ensuing, there is a statement to the effect that defendant refused to pass the plaintiff back to Princeton, and that he had to pay his fare, but it is not therein stated how much he paid.

"The only claim the plaintiff makes in reference to the February shipment is the refusal of the defendant to pass him back from St. Joseph to Princeton. The evidence in support of that claim is that of the plaintiff's father, who went with that shipment to St. Joseph. He testified that he returned home on a passenger train and that he tendered the shipment contract to the conductor for his fare, and it was refused, and he paid the fare, $3.10. The plaintiff on
314 being informed of this payment re-imbursed his father for that outlay.

"The verdict was for the plaintiff for $60 on the August shipment, $50 on the January shipment, $25 on the March shipment, and $3.10 for the return fare of plaintiff's father on the February shipment.

"The points made in the defendant's brief in reference to the verdict for the several amounts of damages are all based on the proposition that the bills of lading stating that the hogs were shipped at a reduced rate, and in consideration thereof the defendant's liability was limited. It will not be necessary for us to discuss the question as to whether the defendant by such a contract could avoid its common law liability in such case, because the contracts in evidence do not show that there was any reduced rate or any consideration for the alleged limitation of liability."

McFadden v. Missouri Pac. Ry. Co. (Southwestern Reporter, Vol. 4, page 689, decided by the Superior Court of Missouri June 6th, 1887):

The following paragraphs are portions of the opinion of the Court:

"But the stipulation in the contract of shipment most relied on for a reversal of the judgment is the one declaring the company should not be liable for more than $100 per head for the mules. Such a stipulation, it is claimed, is valid and binding, and does not contravene the rule which forbids the carrier to stipulate against his own negligence. Numerous decisions sustain such stipulations, when fairly made, and where the parties agree on a fixed valuation of the property, and a special and reduced rate of freight is given and received, based upon the condition that the carrier assumes liability

only to the extent of the agreed value of the property. Hart
315 v. Railroad, 112 U. S. 331, 5 Sup. Ct. Rep. 151, and cases cited."

* * * * * * *

"In the case now before us there was no pretense that the plaintiff or his agent fraudulently concealed or falsely represented the real value of the mules. They were delivered without any inquiry or representation as to value. They may have been a somewhat choice lot of mules, but they were not of extraordinary or fanciful value, such as blooded stock, or on account of speed or other qualities as in the Harvey Case, and there is no pretense that defendant was in any way deceived as to their value, or misled as to the degree of care they would require. On the other hand, the recital that the given rate was a reduced rate was in fact false, as was shown by the evidence of the station agent, who testified it was the usual rate charged all shippers. If, in the one case, it is competent for the carrier to show that the real value of the property was concealed, and the lower rate thus secured by the fraud or deceit of the shipper, why may not the shipper be permitted to show that the alleged reduced rate, in consideration of which he surrendered the obligation imposed by law upon the carrier as an insurer of the property, was false, and in fact no reduced rate at all? It may be that plaintiff was not deceived by it at the time, as he did not ask for or suppose he was getting a reduced rate; but if the pretended lower rate was the usual rate, and known to be such to both parties, it would work a fraud upon the rights of plaintiff, under the law, if the defendant were now permitted to treat it as a lower rate, and to thus deprive plaintiff of important rights, and thus secure release of part of its liability by reason thereof. Under the circumstances of this case there was, we think, no consideration for the limited valuation placed upon the mules by defendant, and the stipulation in that respect is, we think,
void, as releasing the carrier from the full and reasonably
316 adequate liability for its negligence The instructions given for plaintiff were in harmony with these views, while those refused for defendant were not in accordance therewith. Finding no error in the record, we affirm the judgment; and it is so ordered."
(All concur.)

Ward v. Missouri Pacific Ry. Co. (Southwestern Reporter, Vol. 58, Page 29, decided by the Supreme Court of Missouri, Division No. 1, June 12, 1900):

The following is a portion of the opinion of the Court:

1. Appellant's chief assignment of error is the action of the trial court in giving to the jury an instruction in behalf of plaintiff to the effect that in assessing plaintiff's damages they would disregard the limitation valuation agreement in the bill of lading issued by the defendant company, and that their verdict should be for such amount as they may believe from the evidence was the actual value of the goods sued for, at the point of shipment, not exceeding the sum named in plaintiff's petition. Whether the court, in giving instruc-

tion numbered 3, complained of by appellant, thought the limitation valuation clause in the bill of lading based upon a rate of tariff less than the regular rate, void because in contravention of the interstate commerce act, or whether, from all the testimony, it determined that, notwithstanding the recitation in the bill of lading, no reduced charge or tariff rate was in fact given to plaintiff (and hence no consideration for the promise to accept a value less than the true
317 one for the property shipped, in the event of its loss or damage), there is nothing appearing of record to indicate. For either reason the court's action might properly be sustained. If we look solely to the face of the bill of lading itself, unaided by outside testimony, clearly it must appear as a shipping contract prohibited by the interstate commerce act. The clause in question reads as follows: "In consideration of the rate of tariff, which is less than the regular rate from Pittsburg, Kan., to Kansas City, Mo., being granted and agreed upon, to apply to the shipment herein described, consisting of the articles described below, consigned by G. E. McKim to F. W. Ward, it is hereby agreed by the undersigned, in whose favor this contract is executed, that the valuation of my said goods above described shall not exceed five dollars per hundred pounds; and if the same are lost or damaged while in transit, or before delivery is effected to consignee, and said Mo. Pac. Co., or any other line over which the said goods may be carried under this contract, shall be legally liable for such loss or damage, the amount of value claimed therefor shall not exceed the said sum of five dollars per hundred pounds. (Signed) G. E. McKim."

That the chief and essential aim of the interstate commerce act was to require equality and uniformity in all transportation charges to all persons for similar service, shipping from one state to another, and to prevent unreasonable and undue preferences to persons, corporations, or localities by way of special or reduced rates, is most manifest.

By sections 2 and 3 of said act it is provided:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from
318 any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject *to* any particular

description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 379.

By section 6 of an act to amend in part said original act of February 4, 1887, passed March 2, 1889, it is provided:

"SEC. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates and fares
319 and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. * * * No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given. And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force. * * *" 25 Stat. 855.

320 If these acts mean anything, clearly it is that all transportation companies are peremptorily required to fix and make all tariff charges equal for like services rendered under substantially similar conditions. If there is but one rate or charge permissible for one class of freight under the act in question, then such a thing as a rate "less than the regular rate" is prohibited, and defendant ought not to be permitted to plead the violation of law as a defense to liabilities incurred in the line of its duty as a common carrier under the law. To say that the rate established by the bill of lading ("less than the regular rate") was made in considera-

tion that plaintiff placed a reduced valuation upon the propert shipped does not put the contract of shipment without the prohib tion of the act, but simply illustrates how, by the mere subterfug of a reduced valuation clause, inserted in shipping contracts, classe innumerable might be established, and the whole scheme of un formity in charge contemplated in the interstate commerce act b nullified. If the simple question of a diminished valuation of designated article or class of property to be shipped would wor for it a new rate in the schedule of charges required to be printe or hung up to public view in the depot or station house of th transportation company, the provision of the law forbidding r ductions as well as advances in the rate charges, except after publi notice, would mean nothing; and new schedules arranged an classes formed to suit every special friend of the company or favore locality applying for transportation rates would be the rule of pra tice, as before the enactment of the law. The interstate commerc act was passed to meet and defeat the very evil of "special or reduce rates" pleaded in this case as a defense, in part, to defendant liability. Special contract rates and scheduled rates, or rates dete
minable by definite and published rules, cannot be reco
321 ciled one with the other. A contract is special only as
alters general terms and conditions.

2. If now we leave the consideration of the question of the effe of the interstate commerce act upon the contract of shipment as appears upon its face, and turn to the consideration of the fact the case as developed at the trial, the action of the court in givi plaintiff's instruction numbered 3, telling the jury to disregard th limitation valuation agreement in the bill of lading, and asse plaintiff's damages at the actual value of the goods sued for, migh be upheld upon the further ground that notwithstanding the recit tion in the bill of lading of a "rate of tariff which is less than th regular rate from Pittsburg to Kansas City, Mo., being granted a agreed upon," no such fact was shown to have existed; but, on th contrary, all the facts showed that no discrimination was made i favor of plaintiff, and that he was charged the regular tariff ra from Pittsburg, Kan., to Kansas City, Mo., for the kind and cha acter of freight shipped by him, as same was published in th schedule of charges required to be made by the defendant compan The mere statement by defendant's station agent that "the goo were carried at a less rate than they would have been carried if th had not been released" is not a denial of the fact that 49 cents per 1 pounds (the rate actually paid for the goods which he did receiv was less than the regular schedule of rates fixed and published b the company for the character of goods shipped by plaintiff fro Pittsburg, Kan., to Kansas City, Mo. In fact, the witness, in dire terms, says that 49 cents was the schedule rate indicated betwe
Pittsburg, Kan., to Kansas City, Mo. A schedule or a fix
322 rate is a fact, and, when given by a witness, he cannot wi
out, destroy, or avoid the force of that fact by telling wh or under what circumstances it was established or was sought to b defeated. It is no denial of the fact of the existence of a 49 ce

per 100 pounds rate between Pittsburg and Kansas City, on household goods of the kind shipped in this instance, for the station agent of defendant to say that in order to get that rate the company requires all shippers to sign a bill of lading wherein it is stipulated that the value of the property shipped does not exceed $5 per 100 pounds, and that, in case same is lost in transit or before delivery, the company shall not be liable for more than that sum. There was really no substantial testimony upon the issue tendered by defendant,—that the tariff rate given plaintiff- was less than the regular or schedule rate,—and for that reason the court might properly have given plaintiffs' instruction numbered 3. There was no consideration for the "reduced valuation clause" in the contract of shipment, and to that extent it was void and inoperative, and should not have been considered by the jury.

Plaintiffs close.

Defendant introduced the following extracts from the opinions of the Courts of the State of Missouri as evidence to show the laws of that state:

Mires vs. Frisco (Southwestern Reporter, Vol. 114, page 1052, decided by the St. Louis Court of Appeals, Missouri, December 15th, 1908):

323 The opinion of the Court is as follows:

NORTONI, *J.*:

In this action, plaintiff seeks to recover the value of seven jacks lost through the negligence of defendant while being transported by it in the capacity of common carrier. The plaintiff recoverd, and defendant appeals. The defendant undertook to carry the animals from Mountain Grove, Mo., over its lines, particularly through the State of Kansas, to Kansas City, Mo., and there safely deliver the same to a connecting carrier for transportation to Oaksdale, in the State of Washington. There were fifteen jacks and one horse in the shipment. The evidence tended to prove that, through the negligence of defendant, fire was communicated to and ignited certain combustible material used for bedding in the car containing the animals. The fire consumed the car and resulted in the destruction of seven of the jacks. Plaintiff sues for the value of seven jacks destroyed, which is alleged to be $3,500.00. The jury returned a verdict for that amount. There are numerous errors prejudicial to the defendant in the record. The Court submitted the issues on inconsistent theories and materially invaded the rights of defendant in the admission of testimony and instructions given. To notice separately each of the just grounds for complaint on appeal would prolong the opinion to an unpardonable extent. By treating solely with the material facts established beyond controversy, the cause may be properly disposed of without a separate discussion of the several errors appearing.

It appears plaintiff had been engaged for 30 years in shipping stock over the railroads. He testified that during those years he had

probably read as many as 100 live stock contracts under which he shipped. On the day of the shipment in question, February
324 25th, 1905, having loaded the animals in the car, plaintiff applied to defendant's agent at Mountain Grove to enter into a contract with him for their transportation to Kansas City. Immediately preceding defendant's printed form of live stock contract and on the same sheet of paper therewith, the defendant has prepared a printed application for the use of its prospective patrons who desire to avail themselves of a lesser or reduced rate of freight in consideration of *surrounding* certain common law rights against the carrier. Upon plaintiff's proposing a contract with defendant covering the shipment involved, defendant's agent prepared the application referred to by filling in the blanks thereof, and the plaintiff executed the same by affixing his signature thereto. Completed, it appears as follows:

'Frisco.

St. Louis & San Francisco Railroad Company.

Read this Contract Carefully, as Numerous Changes Have Been Made.

Notice.

This Company Has Two Rates on Live Stock.

Shippers of Live Stock will take notice that rates of freight, and the extent of liability of the Company, are governed by the valuations which they place thereon. Rates of freight are on file and will be shown by Agent on Application.

To the St. Louis & San Francisco Railroad Company:

The undersigned offers for shipment over your road 15 head of jacks from Mountain Grove to Kansas City, each head of the estimated weight of — pounds, and valued at One Hundred Dollars per head, and one head of horse from Mountain Grove to Kansas City, each head of the estimated weight of — pounds, and
325 valued at One Hundred Dollars per head, which valuation is named by me for the purpose of securing a reduced rate of freight on this shipment; and I agree that in case of loss or damage to same said valuation so named shall be conclusive, should I make any claim for such loss or damage against any carrier over whose line the same may pass.

This application is an election on my part to avail myself of a reduced rate, by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations.

G. T. MIRES,
Owner or Shipper.

Witness:

——— ———.

The St. Louis and San Francisco Railroad Company accepts this shipment and the above valuation as a basis for fixing the rate of freight thereon.

ST. LOUIS AND SAN FRANCISCO
RAILROAD COMPANY,
By J. H. LIVINGSTON, *Agent.*

NOTE.—The rates of freight on live stock are fixed in view of the nature and extent of liability, assumed by the carrier, and all kinds of live stock shipped in car loads under a contract similar to the following, limiting the liability of the carrier, are taken at reduced rates; all kinds of live stock will be taken at carrier's risk if the shipper so elects, at rates provided for by the existing tariffs, classifications, and under the provisions and conditions relating thereto; and in either event no agent of this Company has
326 any power to bind it in any way, with regard to the shipment of live stock, except by written contract.

Defendant's agent, having accepted plaintiff's proposition as indicated on the application, proceeded to enter into a written contract with him providing for shipment of the animals mentioned from Mountain Grove to Kansas City, Mo. The consideration mentioned is $46.20 freight charges, which amount is recited in the contract to be a "special rate and less than the rate charged for shipments transported at the carrier's risk; in consideration of which reduced rate it is mutually agreed between the parties as follows," etc. The tenth stipulation of the contract recites that it is agreed the defendant shall not be liable in case of the total loss of stock for an amount in excess of the agreed value stated in the shipper's application annexed and made parcel of the contract, and that the value named in such application shall be conclusive upon the parties to the contract. The contract containing the stipulation referred to was signed by plaintiff and by the defendant, through its agent. The defendant concedes its liability to the amount of $100 per head on each of the jacks mentioned, but invokes the stipulation of the contract limiting its liability against plaintiff's right to recover an amount beyond the agreed value. Defendant asserts that it had two rates of freight on each animal. Under the higher rate, the transportation would be had at the carrier's risk with full common law liability annexed; while, under the second or lesser rate, transportation would be furnished under the release or agreed valuation contract only, such as involved in this case. It asserts that defendant chose the latter of the two rates, and therefore entered
327 into a valid contract with it, for giving in part defendant's common law liability in that behalf. In reply to this, the plaintiff pleads that the special contract with respect to the agreed valuation of the animals was entirely without consideration and therefore void and of no effect.

While it is true the policy of the law forbids a common carrier from contracting for exemption from liability on account of the negligence of it or its servants in transporting property. It is well

settled that a contract, supported by a sufficient consideration, limiting the common law liability of the carrier to an agreed valuation, will be sustained. The usual consideration in such cases is a reduced rate of freight. It is said to be entirely proper for the carrier and shipper to agree upon such valuation and adjust the amount for which the carrier should respond with reference to the rate charged for carriage. Harvey v. Railway Co., 74 Mo., 538; Hart v. Railway Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Snider v. Adams Ex. Co., 63 Mo. 376; Ketchum v. Express Co., 52 Mo. 390; McFadden v. Railway Co., 92 Mo. 343; 4 S. W. 689, 1 Am. St. Rep. 721; Railway Co. v. Cleary, 77 Mo. 638, 46 Am. Rep. 13; O'Bryan v. Kinney, 74 Mo. 125; Duvenick v. Railway Co., 57 Mo. App. 550; Cau v. Railway Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; Rogan v. Wabash R. R. Co. 51 Mo. App. 665; Conover v. Pacific Ex. Co., 40 Mo. App. 51; 5 Amer. & Eng. Enc. Law (2d Ed.) 298 et seq. Nothing appearing to the contrary, it is generally true that a contract purports validity on its face, and therefore a valid consideration. This rule obtains in numerous jurisdictions in respect of contract for the shipment of live stock. York, etc. Ry. Co.
328 v. Central Ry. Co. 3 Wall. 107, 18 L. Ed. 170; McMillan v. Michigan, etc., Ry. Co., 16 Mich. 79, 93 Am. Dec. 208; Louisville, etc. Ry. Co. v. Oden, 80 Ala. 38; St. Lo. etc. Ry. Co. v. Lesser, 46 Ark. 236; Sprague v. Mo. Pac. R. R. Co. 34 Kan. 347, 8 Pac. 465; 5 Amer. & Eng. Ency. Law (2d Ed.) 300; 4 Elliott on Railroads, Sec. 1504. However this may be, the rule seems to be established in this state to the effect that, unless it appears from a recital in the contract, or other competent evidence, that a reduced rate of freight was in fact given, limitations on the carrier's liability therein contained will be declared of no effect. Phœnix Power Mill Co. v. Wabash Railroad Co., 101 Mo. App. 444, 74 S. W. 492; Id., 196 Mo. 663, 94 S. W. 235; Id., 120 Mo. App. 566, 97 S. W. 256; Kellerman v. K. C., etc., Ry. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; Duvenick v. Mo. Pac. Ry. Co., 57 Mo. App. 550. And Parol evidence is admissible to establish the true consideration or to explain or contradict recitals of the contract touching the same. McFadden v. Mo. Pac. R. R. Co., 92 Mo. 34, 4 S. W. 689, 1 Am. St. Rep. 721; Kellerman v. Railway Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828. In the absence of fraud or imposition, a patron of a railroad, like other men, is bound by the contract he executes. It is for him to examine and ascertain its text before affixing his signature. After that, he is presumed to know the contents of the contract executed by him, and is bound, prima facie at least, by the recitals of fact against his interest contained therein. Where the contract recites the consideration to be a reduced rate of freight, and this recital is not controverted or overthrown by other competent evidence, the contract recital to that effect it declared to be prima facie evidence of the fact and sufficient to support a judgment thereon affirming the limited liability of the carrier. St. L., etc. Ry. Co. v. Cleary, 77 Mo. 634, 46 Am. Rep. 13; McFadden v. Mo. Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; O'Bryan
329 v. Kinney, 74 Mo. 125; Wyrick v. M. K. & T. R. R. Co., 74 Mo. App. 406; Cau v. Texas, etc. Ry. Co., 194 U. S. 427, 24 Sup. Ct. 603, 48 L. Ed. 1053.

It appears in the case now under consideration that, while affixing his signature to the application for the contract with respect to the shipment, plaintiff was confronted with the following warning in letters of bold type: "This company has two rates on live stock. Shippers of live stock will take notice that rates of freight and the extent of the liability of the company are governed by the valuation which they place thereon. Rates of freight are on file and will be shown by the agent on application." In the application, he fixed an agreed valuation on the animals and recited his desire to obtain a contract for their transportation based upon the valuation so named; this, for the purpose of securing a reduced rate of freight on the shipment which he preferred, instead of shipping the same at a higher rate without limitation on the carrier's liability. The record is devoid of an effort to prove that the plaintiff was induced to sign this application or the contract through fraud, or that he was imposed upon. If, in the absence of fraud or imposition, he is presumed to know the contents of the instrument executed by him touching the shipment, the facts recited present a clear and positive case of the shipper exercising his option and opportunity to choose the lesser of two rates, and, as a consideration therefor, forgive a portion of the carrier's common law liabilities. Cau v. Texas, etc., Ry. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; 5 Amer. & Eng. Ency. Law (2d Ed.) 298. Aside from the recitals in the application mentioned, the contract itself recites the rate of freight, $46.20, to be a special and reduced rate of freight and less than the rate charged for shipment transported at the carrier's risk, and it is said, in consideration thereof, the shipper agrees to the limitations contained in the contract. This of itself is sufficient to establish prima
330 facie that a reduced rate of freight was given, and therefore a valid consideration for the contract exists. Although plaintiff testified, and his evidence was received over the objection and exception of defendant, to the effect that he did not know the company had two rates of freight and had not read the application and contract before signing, his evidence wholly fails, and in fact he made no effort to prove that the defendant did not in fact have in force two rates, of which he chose the lesser. His evidence goes only to the effect that he did not know the company had any rate other than that given for the shipment. Even if this evidence were competent, and it was not, in a case such as this, where no fraud or imposition is either pleaded or proven, it would be entirely insufficient to overthrow the prima facie case made by the recitals contained in the application and contract, to the effect that the company had two rates of freight, and that the plaintiff exercised his option and opportunity by choosing the lesser. Aside from the prima facie proof involved in the recital of a reduced rate of freight in the contract, the defendant proved beyond controversy, by the introduction of its tariff sheets in evidence, that it actually had in force at the time two rates of freight. It appears from the tariff sheets that the rate from Mountain Grove to Kansas City, on a 34 foot car, such as that employed in this shipment, laden with horses and mules, was $46.20, when the shipment was made under an agreed valuation and limited

liability contract, as in the present instance. This was the lesser of the two rates referred to. The tariff sheets provided that 110 per cent. of the rate last named should be charged on shipments made without limitation on the carrier's liability at common law. This, then, is the higher of the two rates. By its payment, there is
331 afforded to the shipper the full common law liability of the carrier as insurer of his stock while in transit. By a competent provision to be found on page 14 of the tariff sheets, the rates named on horses and mules are made to apply on jacks as well. From this it appears, wholly independent of the recitals in the contract to that effect, to be conclusively established that the plaintiff actually received the benefit of the lesser of the two rates, and this afforded an ample and sufficient consideration for the limited liability contract.

Although the point of shipment and the point of delivery to the connecting carrier mentioned in the contract—that is, both Mountain Grove and Kansas City—are in the State of Missouri, defendant's road for some distance between these two points passes through the state of Kansas, and therefore the contract of carriage and the shipment thereunder was interstate, rather than domestic. The proposition has been pointedly determined by the Supreme Court of the United States in Hanley v. Railway Co., 187 U. S., 617, 23 Sup. Ct. 214, 47 L. Ed. 333. This being true, the defendant's rate for carriage of jacks between the points mentioned is, of course, to be determined by reference to its tariff sheets and schedule of rates published and on file with the interstat- commerce commission. It is established beyond controversy that the defendant had filed its tariff sheets and schedule of rates with the interstate commerce commission and had the same on deposit with its agent at its depot at Mountain Grove. It does not appear, however, that it had posted a copy of the same in two conspicuous places in its depot for the information of the public, as contemplated by the interstate commerce act. The evidence touching this feature of the case tends to prove that, instead of posting the tariff sheets and schedules of rates in its depot,
332 the defendant had posted a notice directing the attention of the public to the fact that such schedules and tariff sheets were on file with its agent and subject to inspection upon inquiry. Plaintiff bases an argument upon this proof to the effect that the defendant's rates were not in force, for the reason it had failed to post copies thereof in the depot. It is urged the defendant had not established two rates on interstate shipments, and therefore the rate of $46.20 mentioned in the contract was the only rate which obtained with respect to the shipment in controversy. The case of Wabash Railroad Co. v. Sloop, 200 Mo. 98 S. W. 607, is relied upon to sustain the proposition thus advanced. In this connection the proposition may be asserted that where the carrier has promulgated its rates under the interstate commerce law, and complied with the statute by filing a copy of the same with the commission, deposited a copy thereof with its agent, and posted copies in two conspicuous places in its depot, shippers are presumed to know the existence of the schedules, for the reason the dates are established by authority

and in execution of the law and are open to public inspection. That is, in such circumstances the shipper is chargeable with constructive knowledge of the rates provided in the tariff sheets and schedules posted. Gerber v. Wabash R. R. Co., 63 Mo. App. 145. In Wabash R. R. Co. v. Sloop, supra, relied upon by plaintiff, the railroad company, plaintiff, had failed to post his schedules and tariff sheets, identically as in this case. Its agent having contracted with and shipped for Sloop a lot of timothy seed at 16 cents per bushel, through mistake, when the tariff rate thereon was 26 cents, the railroad company prosecuted the action and relied upon the proposition that Sloop was presumed to know, or, in other words, was constructively charged with knowledge, of the 26 cents per bushel rate promulgated in its tariff sheets. It appearing
333 from the evidence that the railroad company had failed to post its schedules and tariff sheets in the depot, the Supreme Court decided that Sloop was not chargeable with constructive knowledge thereof. The sum and substance of the ruling in that case is to the effect that, in the absence of actual notice thereof, unless the tariff sheets and schedules are posted in the depot in accordance with the statute. That is to say, the shipper is not chargeable with constructive notice of the rates contained in the tariff sheets, unless those rates have been posted in the depot in accordance with the obvious intention of the statute to give notice thereof to the public generally. See Wabash Railroad Co. v. Sloop, 200 Mo. 198, 210, 211, 98 S. W. 607.

Conceding such to be the law, the mere fact that the defendant failed to post the schedules and tariff sheets does not necessarily render nugatory the rates promulgated and filed with the interstate commerce commission and deposited with the station agent. That result alone would relieve plaintiff's situation in the present controversey, for, if the two rates were valid in this case, it appears from the contract and his application that he had actual notice of their existence. The Supreme Court of the United States, which is an authority superior to all others on the interpretation of a federal statute, in the case of Texas, etc., Ry. Co. vs. Cisco Oil Mill, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562, has recently declared that the requirement of the interstate commerce statute, to the effect that the schedule and tariff sheets shall be "posted in two public and conspicuous places in every depot," etc., is not a condition prece-
334 dent to the establishment and placing in force of the tariff rates. It is said that such provision contemplates the existence of an established rate and has for its object only the matter of affording special facilities to the public for ascertaining the rates actually in force. The rates are valid even though not posted. It therefore appears that, even though the defendant's schedules and tariff sheets were not posted in the depot so as to charge plaintiff with constructive knowledge of their contents, the rates were nevertheless valid and actually in force at the time the shipment was made. However all of this may be, it appearing the rate was valid and in force, the matter of constructive knowledge is entirely beside the case, for the reason plaintiff's application for and the contract of

shipment itself recited that he had actual knowledge of the two rates. Further, it is ovvious he exercised his option and opportunity by choosing to release a portion of defendant's common-law liability in consideration of the payment on his part of the lesser or reduced rate of freight; whereas, he might have shipped under the higher rate and held defendant to the full measure of its common-law liability as an insurer.

The judgment will be reversed, and the cause remanded, with directions to the trial court to enter judgment for the plaintiff in accord with the agreed valuation in the contract of affreightment, to-wit, for $700, with 6 per cent. interest from the date of filing the suit.

It is so ordered.

Bland, P. J., and Goode, J., concur.

335 Townsend & Wyatt Dry Goods Co. v. United States Express Co. (Southwestern Reporter, Vol. 113, page 1161, decided by the Kansas City Court of Appeals, Missouri, Nov. 16, 1908):

The following is a portion of the opinion of the Court:

"We believe it is entirely for a carrier to limit the amount of its liability for negligence where the shipper fixes a valuation upon the goods shipped, and agrees that the carrier's liability shall not be in excess of such value, when it is shown that on goods of greater value a higher rate is exacted. In such cases it is not a question of reduced rate, but a classification of rates according to value. In such cases "a carrier may make reasonable regulations, graduating its compensation, and providing that, in case of failure of the shipper to declare the value as required, it shall be deemed not to exceed a certain sum." Elliott on Railroads, §1510.

"Further referring to the testimony, it appears that Johnson, Cowdin & Co., who shipped the goods as agent for plaintiff, were familiar with defendant's rule for classification of rates according to value, and, with such knowledge, fixed the valuation on the goods shipped to plaintiff. It is common knowledge that shippers by express as a rule fix the value of their goods. Suppose a man has shipped very valuable goods, but in order to get a lower rate greatly undervalues it, and the goods are lost, ought his claim for the actual value of the goods be allowed? In the first place, his representation of value was a fraud upon the carrier and made for the purpose of obtaining a lower rate of carriage; and so it is in every case where the real value of the goods is not given, but one of less value is represented in order to obtain the lesser charge for carriage. In
336 such cases the law is, or should be, that the shipper be held to abide by his contract. In cases where no value is given the carrier assumes the risk, and is liable for the actual value of the goods lost by his negligence. On the other hand, the shipper who undervalues his goods for the purpose of availing himself of a lower rate assumes the risk in case of loss of the difference between their assumed and their real value. Such, we conclude, to be the law of the

State of New York lex loci contractus, and the law in every other jurisdiction."

The facts in that case were that the defendant express company received from plaintiff certain goods for shipment and upon the receipt thereof issued to plaintiff a receipt which contained a recital that the liability of the company was limited to $50.00 unless a greater value should be stated in the receipt.

Kellerman et al. v. Kansas City, St. J. & C. G. R. Co. (Southwestern Reporter, Vol. 34, page 41, decided by the Supreme Court of Missouri):

The suit was brought to recover damages from the defendant as a common carrier for the loss of one bull, which had been received by the defendant for transportation from Maryville, Mo., to Kansas City, Mo., the shipment, however, in course of transportation, passing out of the state and then back into the state. The bill of lading upon which the bull was shipped contained a stipulation that in case of loss, the value should not exceed $50.00.

The opinion of The Court was as follows:

BURGESS, *J.*:

As the petition alleged "that, in consideration of the regular tariff rates per car to be paid, defendant agreed to transport said bull to the city of Kansas," and this averment was admitted in the
337 answer, which stated that the regular tariff rate was agreed upon by the terms of the contract, it must, in the absence of an averment that the contract was obtained by fraud or deceit, be held that such was the contract of shipment entered into between the parties. Furthermore, it has been repeatedly held by this court that where a shipper, in the absence of fraud or deceit, signs a contract of shipment, he is conclusively presumed to know its contends, terms, and conditions, and to have assented thereto. O'Bryan v. Kinney, 74 Mo. 125; Railway Co. v. Cleary, 77 Mo., 634; Rice v. Railway Co., 63 Mo., 314.

In the absence of a fixed rate, in dollars and cents, for freight on the shipment of the bull, being specified in the contract of shipment, the rate to be charged was the customary rates, such as were fixed by the schedules showing the rates for freight which the defendant had established, and which were in force at the time upon the line of its road upon which the animal was shipped, copies of which schedules are required by section 2639, Rev. St., to be kept posted in every depot or station upon said road, in such place where the same can be conveniently inspected by every person interested in the same, and to be filed with the railroad commissioners of this state; and, from the date of such filing, the rates and charges specified in such schedule, not being in excess of any statutory maximum rates, become the established rates of such common carrier. There is no averment in the pleadings that plaintiffs did not know what the tariff rates were, and, even if there had been, it would not have availed them anything, because they could not complain of that which they ought to have known, and, by reason of their own negligence, did

not know. They could have easily ascertained defendant's rates by an examination of the schedule of rates which was posted up in defendant's depot or station, for the information and benefit
338 of its patrons.

Under the agreed statement of facts, the court was justified in finding against defendant on the ground of negligence. The vital question in the case, however, is as to the measure of damages which plaintiffs were entitled to recover. As bearing upon this question, the court, over the objection of defendant, permitted the plaintiffs to introduce parol evidence to the effect that there was nothing said between the contracting parties, at the time of the shipment of the bull and the execution of the contract of shipment or bill of lading, as to the rate of freight to be paid, or as to his value, and that the bull was then of greater value than the maximum value fixed by the bill of lading. From the view we take of the case, it is wholly immaterial whether there was anything said at the time of shipment as to the value of the bull or not, for whatever may have been said was merged in the printed contract, which must be taken, in the absence of fraud or mistake, as the sole evidence of the final agreement of the parties, as to everything incorporated in it. Long v. Railroad Co., 50 N. Y. 76; Snider v. Express Co., 63 Mo. 377; Grace v. Adams, 100 Mass. 507; Belger v. Dinsmore, 51 N. Y. 166; O'Bryan v. Kinney, supra. This evidence was competent for the purpose of fixing the actual value of the bull, which was not fixed by the bill of lading.

That a carrier may, *but* special or express contract fairly and understandingly made, limit his common-law liability, and the shipper release the carrier from its obligation as insurer of his property, is well settled law; but it is equally well settled that the carrier cannot, by any kind of agreement or contract, exempt itself from losses accruing by reason of its own negligence. The defendant could not have, by any sort of contract, limited its liability against
339 its own negligence in the transportation of the bull; but it does not follow that it could not, by contract fairly entered into, for a valuable consideration, limit the amount of damages to be paid by it in consequence of any loss which the owners might sustain by reason of loss or injury to the animal by the carrier's negligence. It is difficult to see how a contract by which it is expressly agreed that the value of an animal shipped does not exceed a certain sum can, in case of its injury, loss or death, by reason of the negligence of the carrier, be construed as a contract exempting the carrier from its common-law liability for damages on account of its own negligence.

Harvey v. Railroad Co., 74 Mo. 538, was a suit for injuries to a horse while in transit over defendant's road, and by special contract the horse was shipped at reduced rates, and if injured or killed, his value fixed at $100. The court said: "We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped as a contract in any degree exempting the carrier from the consequences of its own negligence. Such a contract, fairly entered into,

leaves the carrier responsible for its negligence, and simply fixes the rate of freight, and liquidates the damages. This, we think, is competent for the carrier to do. And where the reduced value is voluntarily fixed by the shipper, with a view of obtaining a less rate of freight, without any knowledge on the part of the carrier that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than fixed by him." Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, was an action for damages against the defendant as common carrier for breach of a contract to ship five horses, whose value, by agreement, was fixed at not exceeding $200 each. The court said: "The
340 limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." In a recent case in Rhode Island (Ballou v. Earle, 17 R. I., 441, 22 Atl. 1113), where, by express contract, the value of the package in controversy was fixed at $50.00, the court quoted with approval from the Hart case the following: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight, and secure the carriage, if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater
341 risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum invested in the contract." The same question was before the supreme court of Connecticut in Coupland v. Railroad Co., 61 Conn., 531, 23 Atl. 870, where the value of the horse in controversy was, by express agreement, fixed at $100. The court said: "It is a rule established by some of the best authorities, and one which we recognize as expressing the law, that when a contract is fairly made between the shipper and carrier agreeing on the valuation of the property carried, with the rate of the freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier,

the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations of the property after a loss has accrued." There were specified or reduced rates agreed upon in the Hart case, and the bill of lading fixed the value of the horses not exceeding $200 each. The decision in that case was based upon the express ground that the contract of shipment was fairly made by which the value of the property carried was agreed upon, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, that being a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the freight he receives.

In the case at bar it was expressly agreed that the value of the bull did not exceed $50. It will be observed that in all the cases
342 cited upon the question now under consideration there was an express agreement as to the value of the property, or its maximum value fixed at a specified amount in consideration for special or reduced rates; while no reduced or special rates were contracted for in the case at bar, nor was the value of the bull fixed at a specified sum. In McFadden v. Railway Co., 92 Mo. 343, 4 S. W. 689, it was held that "a stipulation in a written contract of shipment, placing a limited valuation on the property shipped in case of its loss by the default of the carrier, when not made in consideration of special or reduced rates of shipment, is not binding on the shipper." The same rule was announced in Rogan v. Railway Co., 51 Mo. App. 665; Duvenick v. Railroad Co. 57 Mo. App. 550; Conover v. Express Co., 40 Mo. App., 31. Under these authorities, we must hold that there was no consideration for the maximum value placed on the bull, and the contract is in that respect void.

There is no pretense that the value of the bull was misrepresented by plaintiffs for the purpose of obtaining reduced rates on its shipment, or that any statement whatever was made with respect to its value at that time; and as its maximum value was fixed at a sum not exceeding $50, under the circumstances, parol evidence was admissible for the purpose of showing its actual value, although it may have been above or below that amount. McFadden v. Railway Co., supra.

Finding no error in the record which would justify a reversal, the judgment of the Kansas City court of appeals is affirmed.

Gantt, P. J., and Sherwood, J., concur.

343 Wyrick v. Railway (74 Mo. App., 406, decided April 4th, 1898, by the Kansas City Court of Appeals):

The suit was one sounding in tort for the breach of defendant's common law duty as common carrier upon the shipment of four jacks from Green Ridge, Missouri, to Vinita, Indian Territory, plaintiff claiming damages in the sum of $2,000.00. The contract covering the shipment contained a provision as follows: "The

carrier does not ship cattle under this contract or at the rate herein given which exceed in value the following price per head: Each jack $100.00," and across the face of said contract was also written the following words: "More or Less, s. l. & C. or Rel. To val. of $100 Each."

There was a suit and at the conclusion of the evidence adduced the court gave an instruction in the nature of a demurrer which declared that the plaintiff could not recover more than $100 per head for the jacks shipped. The opinion of the Court was as follows:

The questions which we are required to determine arise out of the action of the trial court giving the said instruction for defendant. It is conceded in a case of this kind that the carrier may plead by way of defense a special contract reasonably limiting its liability. Okey v. Ry., 65 Mo. 629, and cases there cited. The rigid rules of the common law which held common carriers liable as insurers have been so far modified by an unbroken line of judicial decisions as to allow them to limit their liability by special contract with their employers, provided such contract does not attempt to relieve them of liability for losses incurred by their negligence or misconduct. Rice v. Ry., 63 Mo. 314; Ketchum v. Express
344 Co., 52 Mo. 390; Ry. v. Cleary, 77 Mo. 634; Read v. Ry., 60 Mo. 199; Sturgeon v. Ry., 65 Mo. 569. It is, too, the well settled law of this state that such contract when fairly and understandingly entered into without imposition or deceit, is prima facie evidence of the truth of its recitals if sustained by a valuable and legal consideration. McFadden v. R. R., 92 Mo. 343; Harvey v. R. R., 74 Mo. 538; Crow v. R. R., 57 Mo. App. 135 (see page 140); Kellerman v. R. R., 68 Mo. App. 255; see S. C., 136 Mo. 177; Duvenick v. R. R., 57 Mo. App. 550; Paddock v. R. R., 60 Mo. App. 328. Or, in other words, the recitals in such contract that the rate is a special one and lower than that charged on shipments without limitation in value is prima facie evidence of the truth thereof. Such recitals are open to explanations or contradiction, but unless they are explained away or contradicted by evidence they become conclusive. McFadden v. Ry. supra; Hart v. Ry. 112 U. S. 351. A special or reduced rate is a sufficient consideration for a limitation placed on the value of the property shipped. Rogan v. Ry. 51 Mo. App. 665; Duvenick v. Ry., 57 Mo. App. 550; Kellerman v. Ry. 51 Mo. 177.

The contract which was put in evidence recites that: "This company has two rates on live stock. Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk as per conditions herein set forth, with the distinct understanding that said rate is a special rate which is hereby agreed to, accepted and understood to be less than published tariff rate applying thereon when transported at carrier's risk." There is a further provision in said contract stipulating that defendant was to haul the car in which the plaintiff's animals were loaded to the place of consignment, 'subject to minimum weights and

length of cars provided for in tariff, the same being a special
345 rate, which the carrier guarantees, and less than the regular tariff rate applying to shipments of cattle not covered by this special contract." And in the same connection is also the provision pleaded in the answer which, in substance, is that in consideration of said special agreement it was mutually agreed that the defendant, "does not ship cattle * * * under this contract or at the rate herein given which exceeds in value the following prices per head: Each * * * Jack, $100;" and that, "in case of loss or damage the shipper represents and agrees that his said cattle * * * do not exceed in value these prices, and in case of any loss or damage thereto by carriers' negligent transportation or handling of said cars, as aforesaid, shippers shall be entitled to receive only actual damages but in no instance more than the stipulated valuation shown above."

It is thus seen that we have the joint recital of the parties to the contract of the fact that the defendant had two rates which it published upon its tariffs—the one the tariff rate for shipments at the carrier's risk which was the higher rate and made the defendant liable for the full value of the property lost, and the other, the reduced or lower rate, applying only to shipments made under special contracts in which there was a limitation on the value.

The recitals in the contract prima facie established that the plaintiff shipped his animals in consideration of a special or reduced rate. And since these recitals are not contradicted or overthrown by any evidence in the case they must be deemed conclusive. The plaintiff testified that he inquired of the station agent of the defendant what a stable car would cost to Vinita, and was told the rate was $51.70.

He also testified that no other rate was mentioned, nor was
346 *was* anything said in relation to limiting the defendant's liability, nor was anything said about valuing the plaintiff's jack at $100, or at any other sum, but this testimony did not contradict the recitals in the contract, nor show that the rate charged was not a reduced rate. It was immaterial, however, whether or not there was anything said at the time of the shipment between the parties as to the value of the jacks or the rate, for whatever may have been said was merged in the printed contract subsequently entered into, which must be taken, in the absence of fraud, as the sole agreement of the parties as to everything incorporated in it. Kellerman v. Ry., supra, and authorities there cited.

But the plaintiff insists that although he signed the contract of shipment he did not then know its provisions; that he was afforded no opportunity to read the same before he signed it. It was no doubt true, as testified by him, that the contract was not presented to him for execution until after the jacks were loaded on the car. But it must be remembered that the statute, section 2593, Revised Statutes, requires the agent of a railway carrier to count the stock when loaded and to state the number in the contract (George v. Ry., 57 Mo. App. loc. cit. 362), and therefore the contract could not have been signed until after these duties were performed. As far as we have been able to discover, from a perusal of the evidence, there

is nothing in the cause to justify the conclusion that any trick, artifice or fraud was practiced by defendant in procuring the plaintiff's signature to the contract. According to the plaintiff's own testimony there was nothing unusual or extraordinary in the circumstances or conditions under which he signed the contract. The rule is well settled that it is the duty of a shipper to read the contract of affreightment and his failure to do so is no defense to its stipulations in the absence of fraud, imposition, or mistake. Mc-
347 Fadden v. Ry. supra; Ry. v. Cleary, supra; O'Bryan v. Kinney, 74 Mo. 125; Snyder v. Express Co., 63 Mo. 376, Kellerman v. Ry., 136 Mo., supra; Rice v. Ry., 63 Mo., supra; Patterson v. Ry., 56 Mo. App. 657. In the first of the last above cited cases it was said: "This court has heretofore held that all prior verbal negotiations between the parties are merged in the written contract and that the plaintiff cannot admit the execution of the contract and avail himself of the fact that he did not read the same or know its contents, where no mistake, fraud, imposition or deceit is charged to have occurred." In another case (O'Bryan v. Kinney 74 Mo., supra) it was said: "As a general rule when goods are delivered to a carrier for transportation and a bill of lading or receipt is delivered to the shipper, he is bound to examine and ascertain its contents, and if he accepts it without objection he is bound by its terms, and resort cannot be had to prior parol negotiations to vary them. That he, the shipper, did not read the bill of lading or know its contents makes no difference; he might have read it and it was his duty to do so and in the absence of fraud or mistake the writing must be taken as the sole evidence of the final agreement of the parties." In Ry. v. Cleary, supra, it was said: "It not appearing that any fraud or imposition was practiced, or that any mistake intervened, the plaintiff must be conclusively presumed to have been acquainted with its contents, and if he did not do so the consequences of his folly and negligence rest on himself. Courts cannot undertake to relieve parties from the effects of such intervention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pursued, or of what limit it would finally admit."

348 If the plaintiff did not know the contents of the contract, and if the time intervening between the loading of the hacks on the car and the starting of the train was so short as not to afford plaintiff a reasonable opportunity to read the same and acquaint himself with its contents, he should have objected and refused to then sign it. But if instead of taking this course he elected to sign it, he can not be permitted to evade its terms on the ground that he did not know its contents. He must suffer the consequences of his own folly and imprudence.

Smith v. Chicago, R. I. & P. Ry. Co. (Southwestern Reporter, Vol. 87, page 9, decided by the Kansas City Court of Appeals, Missouri, May 8th, 1905):

In speaking of the validity of the provision in the live stock contract requiring claim for damages to be presented to the carrier within one day after delivery of the stock at destination, and before the injured stock was mingled with other stock, the giving of such notice was a prerequisite to a right to recover for injuries to the stock, the Court said: "It is a further contention that plaintiff was not entitled to recover by reason of his failure to give the notice required by the contract of his damages. It is conceded that no such notice was given. And it is not a matter of dispute but what the terms of the contract as to such notice included damages resulting from the death or shrinkage of the hogs. In such instances the giving of such notice is a prerequisite to the right of recovery. McBeth v. Ry., 20 Mo. App. 445; Leonard v. Ry., 54 Mo. App., 293; 101 Live Stock Co. v. Ry., 100 Mo. App., loc. cit. 689, 75 S. W. 782; Leonard v. Ry., 54 Mo. App., loc. cit. 302; Com. Co. v. Ry., 80 Mo. App., 164."

Both sides close.

349 I, Sam W. Davis, Official Stenographer for the District Court of the 15th. Judicial District of Texas, do hereby certify that at the request of the Defendant M. K. & T. Ry. Co. I have made up a duplicate statement of facts in the case of Harriman Bros. vs. M. K. & T. Ry. Co., No. 17838 tried in the District Court of Grayson County, Texas, at its January Term, 1909, of which the foregoing is the original; which statement of facts consists of all the evidence introduced upon the trial, both oral and by deposition, stated in narrative form, together with copies made in accordance with the rules of court of all such documents, sketches, maps and other matters as were used in evidence.

Witness my hand this 17th day of April, 1909.

SAM W. DAVIS,
Official Stenographer in and for 15th Judicial District of Texas.

We hereby agree that the foregoing statement of facts prepared by Sam W. Davis, Official Stenographer of the 15th Judicial District of Texas, is a true and correct statement of all the evidence, both oral, written and by deposition, including all documents, sketches, maps and other matters used in evidence upon the trial of the cause of Harriman Bros. vs. Missouri, Kansas & Texas Railway Company, No. 17838 in the District Court of Grayson County, Texas, at its January Term, A. D. 1909.

W. M. WILLIAMS,
WOLFE, HARE & MAXEY,
Attorneys for Plaintiff.
HEAD, DILLARD, SMITH & HEAD,
Attorneys for Defendant.

Examined and approved this 19th day of April, 1909.

B. L. JONES,
Judge Presiding.

350 I, K. S. Loving, Clerk of the District Court in and for Grayson County, Texas, do hereby certify that Sam W. Davis, is the Official Stenographer of the 15th. Judicial District of Texas, duly appointed and qualified, and that the foregoing is the original of the duplicate statement of facts made up by him, agreed to in writing by the attorneys of the respective parties, approved by the Honorable B. L. Jones, Judge Presiding, and filed with me in the case of Harriman Bros. vs. M., K. & T. Ry. Co., No. 17838 in the 15th. District Court of Grayson County, Texas, tried at the January Term, 1909, thereof.

Witness my hand and the Seal of said Court this 19th. day of April, 1909.

[SEAL.]

K. S. LOVING,
Clerk of District Court in and for Grayson County, Texas.

351 *Opinion of Court of Civil Appeals.*

Filed 4, 18, '10.

No. 6060.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant,
vs.
HARRIMAN BROTHERS, Appellees.

Appeal from Grayson County.

On February 9th, 1909, appellees, as plaintiffs, filed their first amended original petition against appellant, as defendant, wherein they alleged: "That heretofore, to-wit, On or about the 30th. day of January, 1907, plaintiffs delivered to defendant, at Pilot Grove, Missouri, a station on one of its lines of railway, thirteen head of fine show and sale cattle to be by it transported to Enid in the State of Oklahoma, and at the same time paid to defendant the tolls and charges for such service. That plaintiffs, at the same time, delivered to defendant certain herdsmen's tools, blankets, halters and other equipment used in and about the handling of said cattle. That defendant accepted and received the property above mentioned in its capacity of a common carrier, and as such, undertook its transportation from and to the points above mentioned. Plaintiffs show to the court that said defendant failed to comply with its said undertaking in that: near the station of Nevada, in the State of Missouri, the train upon which said cattle were being transported was wrecked, and each and all of said cattle killed, and the equipment of plaintiffs on said train was lost and destroyed. * * * Plaintiffs show

to the court that each and all of the cattle aforesaid, were cattle of the highest grade, breed and quality, and were very valuable, all of which facts were well known to defendant. That said cattle were
352 of the reasonable value, were worth and their reasonable cash value was the sum of $15,000.00, and said equipment was of the reasonable value of $100.00. That by reason of the loss and destruction of all the property above mentioned, through defendant's negligence as hereinbefore alleged, plaintiffs have been damaged in the sum of $15,100.00, which though demanded of defendant it has refused to pay."

Defendant answered by general and special exceptions, a general denial and plead specially that the contract by and between plaintiffs and defendant with reference to the carriage of said stock was in writing, duly executed by all of the parties to this suit, acting for themselves or by their duly authorized agents, in the State of Missouri, by the laws of which state said contract was and is in all its provisions legal, binding and valid; that said contract was for the transportation of said cattle from Pilot Grove, Missouri, to Guthrie, in what was then Oklahoma Territory, nor Oklahoma State; which shipment therefore constituted interstate commerce, and said contract was for the transportation of interstate commerce, and by the laws of the United States governing interstate commerce was and is in all its provisions valid and binding. Certain stipulations in the contract were specifically plead which it was alleged relieved the defendant from liability. These stipulations will be treated in the opinion and need not be here set out. The answer denied negligence and alleged that the damages claimed in the petition were due solely to an accident which could not have been foreseen.

A trial before a jury on February 13, 1909, resulted in a verdict and judgment in favor of appellee for $10,640.00, to reverse which this appeal is prosecuted.

353 In its first assignment the appellant complains that the court erred in overruling the second exception to plaintiffs' first amended original petition, as follows: "It is too general, vague and indefinite in stating the extent and amount of the damage and injury to plaintiff's cattle and to each head thereof."

The proposition presented under this assignment is, that w-ere plaintiff sues to recover damages for the loss of several animals, the defendant has the right by special exception to require plaintiff to describe and allege the value of each of the animals; and especially is this true where such value greatly varies; and in such case an allegation of damage in a gross amount is not sufficient. The petition does allege the amount of damage to the cattle. It alleged that "Near the station of Nevada, in the State of Missouri, the train upon which said cattle were being transported was wrecked and each and all of said cattle killed." It states the amount of the damages and injury. The exception does not specifically complain that the petition fails to allege the value of each head of cattle killed. The exception is no more than a general demurrer. Rule 18 for District Ct., 94 Tex., 470; Railway Co. v. Granger, 85 Tex., 574;

Railway Co. v. Croskell, 25 S. W., 492. When tested by a general demurrer the petition was sufficient.

Error is assigned to that paragraph of the court's charge reading as follows: "Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

354 The contention is that a contract for the shipment of live stock from Missouri to Oklahoma, entered into in Missouri, which fixes the value of the animals and the amount to be paid in case of loss, is valid and binding. The contract for transportation stipulated that the carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting from his negligent doing or failure to do any of the things which he hereby contracts to do, or from the negligence of any of his servants. It was stipulated in the contract that the carrier's liability for the loss of each bull was $30.00, and for the loss of each cow it should be $20.00.

The decisions of this state are to the effect that an agreement is a contract for the transportation of live stock made in this state, which provides that in the event of loss the shipper shall not recover the value of his property lost by the negligence of the carrier, is against public policy and void. Railway v. Maddox, 75 Tex., 300; Railway v. Ball, 80 Tex., 606; Railway v. Greathouse, 82 Tex., 110; Railway v. Anderson, 63 S. W., 1024; Railway v. Davis, 31 S. W., 310; Railway v. Montgomery, 16 S. W., 181. This Court held in the case of Railroad Company v. McIntyre, 82 S. W., 346, that a provision in a contract executed in Spartansburg, South Carolina, for the shipment of freight from that place to Ladonia, Texas, stipulating that in the case of loss the shipper was only to recover $5.00 for each 100 pounds of freight, was against public policy and void, in the absence of a consideration for such limitation. In that case the bill of lading recited that the provision was made in consideration of reduced rate at which the goods were shipped. In the instant case there was in fact no reduction in the rate at which the

355 cattle were to be carried and no consideration for the limitation. We think it clear that the stipulation in the contract of transportation fixing the liability of the carrier at $30.00 for each bull and $20.00 for each cow unreasonable and void. The testimony showed that the value of the cattle ranged from $40.00 for the lowest to $8,000.00 for the highest per head. The jury found the value of the 13 head of cattle was $10,640.00. According to the valuation, as fixed by the contract, the four bulls would have been worth $120 and the nine head of cows $180 making $300. It is clear that the value of the cattle was arbitrarily fixed by the carrier in the contract

for transportation without regard to their real value. Again, it is provided by Act of Congress passed June 29, 1906, known as the Hepburn Act, (U. S. Comp. Supp. 1907, p. 909), "that any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." The shipment in this case was from Pilot Grove, in the State of Missouri, to Enid, in the State of Oklahoma, and falls within the terms of this Act, making a carrier liable for loss, damage or injury to property while being transported from a point in one state to a point in another state.

356 We understand that appellant does not controvert this construction, but contends that Section 20 of this Act, which embraces the above clause, is unconstitutional. We do not regard it necessary to go into a discussion of the constitutionality of this Section of the Act. It was reviewed and held constitutional by the Court of Civil Appeals for the Fourth District, in Railway v. Piper, 115 S. W. 107, in which a writ of error was refused by the Supreme Court. It was also held constitutional in an able and exhaustive opinion by Judge Rodgers in Smeltzer v. St. L. & S. F. R. R. Co., 158 Fed. Rep. 149. *Soo* also Riverside Mills v. Railway Co., 168 Fed. Rep., 987, and Railway Co. v. Grayson, 115 S. W., 193. We hold the Act constitutional and that by its terms the limitation under consideration was void.

It is contended that the court erred in charging the jury as follows: "The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein." It is insisted that Congress, having legislated upon the subject, the validity of a contract for an interstate shipment of live stock made in January, 1907, is governed by the Act of Congress and under said Act, and by the common law on questions upon which it is silent, a contract stipulation fixing the time for commencing suit, is valid and binding. This contention is not sustained.

The Act of Congress regulating interstate commerce, approved February 4, 1887, as amended by the Act of June 29, 1906, is silent as to the time within which suits shall be filed to recover damages from the carrier for its negligence in transporting freight.

357 This stipulation in the contract limited the time within which suit must be brought. It affected the remedy only. The remedy was governed by the law of the forum. Railway Co. v. Hambrick, 97 S. W., 1072; Armstrong vs. Railway Co., 92 Tex., 117. By

the statute of Texas the shipper has two years in which to bring such suit. It was agreed that by statute of the State of Missouri a common carrier was prohibited from limiting the time within which suits might be filed against it to less than the statutory period. There was no proof introduced to show what the statutory period was. This provision of the contract was plead and relied on by appellant and the burden was on it to show a valid agreement, and to do this was bound to show that its contract prescribed a valid limitation under the statutes of the State of Missouri. It being agreed that there was a statute in the State of Missouri prohibiting a common carrier from contracting for a shorter period of limitation than that prescribed by the statute and no proof of the statutory period being made, it will be presumed that it is the same as that of the State of Texas. The charge complained of was correct.

Error is assigned to the seventh paragraph of the court's charge reading as follows: "The undisputed evidence on this issue shows that within the thirty days after the loss of plaintiffs' cattle in said wreck, one of defendant's agents met plaintiff, R. L. Harriman, in Bunceton, Missouri, said agent going to said place in response to a letter from said Harriman requesting a conference *from* defendant in reference to this claim for damages; that at this conference the said Harriman delivered to said agent of defendant such written notice of his claim as was required by said stipulation in the contract; that some days afterwards these same parties had another conference over plaintiffs' claim for damages in the city of Sedalia, Mis-
358 souri; that at this conference the said R. L. Harriman took from the posession of defendant's said agent the written claim that had heretofore been given to said agent; that said written claim was taken from said agent without his consent and against his will.

Now, if you believe from the evidence that the said agent, after he received the written claim for damages from plaintiffs, took said claim and from the information said claim furnished, made such an investigation of plaintiffs' claim for damages that caused him to seek the interview with the said R. L. Harriman in the city of Sedalia, and that at said interview he announced to the said Harriman his final conclusion in reference to said claim, you are instructed that plaintiffs fully complied with the stipulation in said contract as to the thirty days notice."

By the terms of the contract the shipper agrees that as a condition precedent to his right to recover any damages for any loss or injury to said live stock resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing, to the conductor in charge of the train or the nearest station or freight agent of the carrier on whose line the injuries occur before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed from pens at destination. In his notice he shall state place and nature of the injuries to the end that they may be fully and fairly investigated, and said shipper shall within thirty days after the happening of the injuries complained of file with some freight or station agent of the carrier on whose line the injuries occurred, his claim therefor, giving the amount, shipper's failure to

comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said
359 live stock as aforesaid, and no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute of limitation to the contrary notwithstanding, and no damages can be recovered except those set forth in the required notice and claim. Herbert Morris, appellant's agent, testified that he met Mr. Harriman at the Antlers Hotel in Sedalia, Missouri, by appointment. As to what took place is best told by the witness in his own language: "I met Mr. Harriman in the hotel, and there was a Mr. Miner present who was traveling passenger agent of the M. K. & T., and a man I was introduced to as Mr. Harriman's brother. It was my understanding he was his brother. We were all four in a room in the Antlers Hotel. After dismissing Mr. Miner, Mr. Harriman made a statement to me. He said, 'I would like to know if you have that paper I gave you when you were over at Bunceton.' I said, 'Yes, I have all the papers pertaining to this matter.' He said, 'My memory isn't good on that matter, and I would like to have the matter refreshed." I said, 'Very well.' He was on one side of the table, and I had been sitting in a chair near the table, and I walked over near the table and handed them to him like this. He made a pretense of looking at it like this, and before I could say anything, he just made a grab and snatched this paper out of the file of those papers. Of course, I became very much annoyed." Harriman's testimony in reference to taking the paper was as follows: "When I met him there there was an offer passed from him to me to settle. He brought witnesses along and made me a proposition to settle. Indeed I did not accept. He stated something to me as to whether or not that was a final proposition or the settlement was off. He said I could take that or nothing; that I wasn't entitled to any-
360 thing. It was after he said that that I took this paper. I did not take that paper out of his hands. We were sitting around a table like this only larger, center table in the parlor in the Antlers Hotel. He had Mr. Miner with him. He and Mr. Miner were on one side and Bert and me on the other. After he made the proposition to settle, I said 'Mr. Morris, if you have no further proposition for me, I am a pretty busy man and I want to go.' The papers were all out there. We had been looking over the papers and discussing them; not only this paper, but the contract and all the papers in the case. I just picked up the bunch of papers and turned them over until I came to this one. 'Now,' I said, 'Mr. Morris, I gave you this paper with the understanding and promise from you that you would take it down to Mr. Krause and show him our loss and try to get an amicable settlement.' I said, 'Now, since this has failed in the proposition, I think this belongs to me and I want you to consent to let me have it.' He flew into rage and nearly had a calf and I got a little hot too and I put the paper in my pocket."

The stipulation in the contract requiring notice of the claim for the loss or injury to the cattle never happened. The cattle were not carried to their destination or delivered to any other carrier and did

not leave the first carrier's line. They were not mixed with other cattle, but were killed in a wreck on the initial carrier's road, and therefore notice, as stipulated, was not required. But conceding it was required and that the facts in reference to Harriman's retaking the paper to be as testified by the witness Morris, it yet appears that appellees has complied with the contract by having theretofore filed their claim. It seems from this evidence that this claim was in
361 the possession of appellant a number of days prior to the time appellant's agent Morris and R. L. Harriman met in Sedalia. The damage to the cattle had evidently been considered. Harriman's act in re-taking the claim did not amount to its withdrawal, unless it was so intended. The claim having been furnished within thirty days accepted and acted upon by appellant by investigating the damage, and served its purpose, and appellant having made a final proposition for settlement and having repudiated liability, the taking of such paper did not constitute a withdrawal of the claim.

On the measure of damages the court instructed the jury as follows: "If you find for plaintiffs you will find for them in such sum as you believe from the evidence was the fair cash market value of the 13 head of cattle in the city of Enid, Oklahoma, at the time they would have arrived there had not such train been wrecked, together with the cash market value of the said herdsman's outfit." This charge is challenged on the ground that there was no allegation as to the market value of the cattle at Enid, Oklahoma, or that they had a market value there; second, that it is upon the weight of the evidence in that it assumes there was a market value for the cattle at Enid, Oklahoma; third, that the evidence was not sufficient to authorize the submission to the jury of the issue as to the cash market value of any of the cattle at Enid, Oklahoma, and especially was it not sufficient to authorize the submission of such issue as to any of the cattle except the bull, Golden Crown. None of these contentions is sustained. The law fixed the damages which appellees were entitled to recover as the value of the cattle at Enid, Oklahoma, the point to which they were being shipped, and where they were to be offered for sale. The allegations of the petition were
362 sufficient to admit the proof of their value at Enid. There was evidence from which the jury were authorized to find their market value at Enid, Oklahoma.

The seventh assignment complains of the court's action in refusing appellant's special charge, as follows: "In the contract under which the cattle in question were being carried it is provided that as a condition precedent to their right to recover any damage for any loss or injury to said stock, plaintiffs should within 30 days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that no damages can be recover- except those set forth in the required claim, and you are instructed that such provision is valid and binding, both under the laws of Missouri and under the Acts of Congress of the United States, entitled, 'An Act to Amend and Act,' entitled, 'An Act to Regulate Commerce,' approved February 4th, eighteen hundred and eighty-seven, and all acts amend-

atory thereof, and to enlarge the powers of the Interstate Commerce Commission, approved February 4th, 1887, and inasmuch as there is neither allegation nor evidence in this case as to the amount of such claim filed, you will find in favor of the defendant."

It is contended that a stipulation in a contract for the carriage of live stock from Missouri to Oklahoma, made in Missouri in 1907, to the effect that in case of loss plaintiff should file with defendant his claim therefor, giving the amount, and that no damages can be recovered except those set forth in such claim, is valid and binding, and the evidence being undisputed that plaintiffs' contract contained that stipulation, and there being neither allegation nor evidence that such stipulation had been complied with, especially as to
363 the amount thereof, the jury should have been instructed to find in favor of the defendant. This contention is not sustained. The cause of action was based upon appellant's failure to discharge its duty as a common carrier and was for the value of the animals killed, and it was not necessary that they should either allege or prove the amount of their filed claim. If appellees sought to recover any damages other than those set forth in their claim, this was a matter of defense and there being no evidence to show that the damages claimed in the petition were different from those set up in the filed claim, no injury could have resulted to appellant.

During the argument of the case and after defendant's counsel in making their argument to the jury, had argued to a great extent, as affecting the value of the bull, Golden Crown the fact that the bull, Choice Goods, which one of the witnesses had stated to be the greatest bull in the world, had been sold for only $5,500. In reply the plaintiffs' counsel in his closing argument stated to the jury that the bull, Choice Goods, at the time of his sale, about which defendant's counsel had argued, was nine years old, and argued to the jury that that fact, according to argument of defendant's counsel as to the age of certain of the cows for which plaintiffs were suing, greatly affected his value, and that as a four year old bull he would have sold for more than a nine year old bull. When plaintiffs' counsel made said statement defendant's counsel objected thereto, and insisted that it was not in evidence that said bull, Choice Goods, was nine years old at the time of said sale or as to the effect of his age upon his value; plaintiffs' counsel stated that that was his recollection of the facts in evidence, and that the jury had heard the
364 evidence and would judge as to who was right. The court, by agreement, was not in the court room during counsel's argument, but at the close of counsel's said argument he returned to the court room and counsel for defendant at once explained to him, in the presence of plaintiffs' counsel, and out of the hearing of the jury, but in open court, what had occurred, as above stated, and that they wished to reserve their exceptions. The court stated that he remembered the evidence, as stated by plaintiffs' counsel, and declined to instruct the jury to disregard the statement. No reversible error is shown by these remarks of counsel. The recollection of the court being that the evidence did show the bull, Choice Goods, was nine years old at the time of his sale and the counsel having stated to the jury that they had heard the evidence and would judge who

was right, must have understood that the question was left to them to determine from the evidence.

Albert Harriman, one of plaintiffs, had, by deposition, testified that Harriman Brothers had shipped thirteen head of cattle on defendant's road and that twelve were thoroughbred short horn cattle and one was a nurse cow and that six of the short horn cattle were show cattle and the rest for sale and had further described five of the show cattle as being his young show herd and had given their pedigrees and as being of a fashionable breed and their market value and among breeders that "show cattle" had such individuality that they could go out in competition and win ribbons. The following question and answer were offered and admitted in evidence by the plaintiffs over the objection of defendant:

Q. How does the value of a show animal compare with another animal of the same age and stock that does not possess the
365 qualities necessary to make him a show animal?

A. Well, it is a great deal higher. It is contended that "show cattle" is a term too broad and indefinite upon which to allow a witness to base an opinion as to value. We are of the opinion that there was no error in this ruling. However, if the evidence was improperly admitted, it was harmless, in view of the fact that other witnesses testified to the same facts without objection.

The verdict of the jury is complained of in several assignments of error as being without evidence to support the same. These assignments are overruled. There was sufficient evidence to justify the jury in their finding.

Because no reversible error has been pointed out the judgment is affirmed.

BOOKHOUT,
Associate Justice.

Delivered April 16th, 1910.

Filed in Court of Civil Appeals Apr. 18, 1910, Geo. W. Blair, Clerk 5th District.

Filed in Supreme Court Jun- 14, 1910, F. T. Connerly, Clerk.

366 *Judgment of Court of Civil Appeals.*

6060.

Mo. Kan. & Texas Ry. Co.
vs.
Harriman Bros.

From District Court Grayson County.

Saturday, *April 16th,* 1910.

Opinion of the Court Delivered by Mr. Bookhout, Associate Justice.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is in the opinion of the Court

that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Harriman Bros., a firm composed of R. L. Harriman and A. C. Harriman, do have and recover of appellant, Missouri, Kansas and Texas Railway Company and National Surety Company, its surety upon appeal bond, the amount adjudged below and all costs in this behalf expended and this decision be certified below for observance.

Motion for Re-rehearing by Appellant.

Filed 4, 28, '10.

In Court of Civil Appeals, Fifth Supreme Judicial District of Texas.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant,
vs.
HARRIMAN BROTHERS, Appellees.

Now comes the appellant and moves the court to grant it a rehearing for the following reasons:

I.

The Court of Civil Appeals erred in overruling appellant's first assignment of error, as follows:

367 *First Assignment of Error.*

"First. The court erred in overruling the second exception contained in defendant's first amended original answer to plaintiff's first amended original petition, as follows: 'It is too general, vague and indefinite in stating the extent and amount of the damage and injury to plaintiff's cattle and to each head thereof.' "

II.

The Court of Civil Appeals erred in overruling appellant's second assignment of error, as follows:

Second Assignment of Error.

"Second. The court erred in overruling the third special exception contained in defendant's first amended original petition, as follows: 'Because said petition does not show whether the contract between plaintiff and defendant, whereby defendant undertook and promised to transport and deliver said cattle, as alleged, was in writing or verbal.' "

Remarks.

The court in its opinion rendered herein seems to have ignored this assignment. We regard the question of practice presented by this assignment as an important one in all classes of cases. We

recognize that it has long been the rule of decision that where a pleader simply alleges that a contract of a certain kind was entered into without stating whether it was verbal or in writing he will be permitted to prove at the trial the contract as alleged, whether it be verbal or written, but we are not advised that it has been decided that a defendant has not the right by special exception to insist upon being advised upon this point.

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III.

The Court of Civil Appeals erred in overruling appellant's third assignment of error, as follows:

Third Assignment of Error.

"Ninth. The court erred in paragraph 6-*b* of its main charge to the jury, as follows: 'Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you.'"

Remarks.

In passing upon this assignment, after quoting Section 20 (the Carmack Amendment of the Hepburn Act), the court uses this language:

"The shipment in this case was from Pilot Grove in the State of Missouri to Enid in the State of Oklahoma, and falls within the terms of this Act making a carrier liable for loss, damage or injury to property while being transported from a point in one state to a point in another state. We understand that appellant does not controvert this construction, but contends that Section 20, of this Act, which embraces the above clause, is unconstitutional."

The appellant certainly does not contend that the shipment in question does not come within the Section of the Act referred to and certainly contends that that Section of the Act is unconstitutional, but that is not the only contention, or even the main contention of appellant. Our views as to the meaning of this Act, it seems to us, are clearly set forth on pages 14 and 15 of our original brief and the authorities there referred to.

369 If the constitutionality of the Carmack Amendment be conceded the question would still remain as to the proper construction and meaning of that Section of the law. Was it intended simply to fix the liability of the initial carrier for the entire amount of damage, leaving such amount to be ascertained in the usual way, either by trial or by agreement between the parties, or was it intended both to fix the liability of the initial carrier for the entire damage and prohibit the ascertaining of the amount otherwise than by a litigated case in court? Our contention is that the

sole purpose of the Carmack Amendment was to fix the liability of the initial carrier for the whole damage regardless of which carrier actually caused the loss, and that it was not intended to prohibit the parties by contract, either before or after the loss from adjusting the amount of the damage for which the initial carrier should be held liable in the usual way. The difference between contracts exempting from liability and contracts of the kind here in question is so fully discussed in the authorities cited in our brief that we do not see how it is possible to make the question plainer. But in addition to the authorities there discussed the case of St. Louis I. M. & S. Ry. vs. Furlow, 107 S. W., 517, has since been published. In that case Justice Battle speaking for the Supreme Court of Arkansas says: "The fifth paragraph of contract of shipment in reference to notice of claim for damages is the basis of the principal controversies in this case. Similar stipulations have been sustained by this court. Kansas & Arkansas Valley Railroad Co. v. Ayers, 63 Ark. 331, 38 S. W., 515; St. Louis & San Francisco Railway Co. v. Hurst, 67 Ark. 407, 55 S. W. 215; St. Louis & San Francisco Railway Co. v. Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75.

370 The Act of Congress known as the "Hepburn Act approved June 29th, 1906 (chapter 3591, 7, 34 Stat. 593, U. S. Comp. St. Supp. 1907, p. 909), does not affect the validity of such stipulations when reasonable and based upon a valuable consideration. That act provides: "That any common carrier, railroad or transportation company receiving property for transportation from any point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

The stipulation in question does not exempt the defendant from liability imposed by that Act, which extended the liability of the initial carrier for loss, damage, or injury to property while in course of transportation over the line of a connecting carrier. Before it was enacted an initial carrier could not exempt itself from such liability for loss, damage, or injury incurred on its own line, yet it was lawful for it to enter into stipulations like the one in question when the shipment of the property was confined to its own line. For the same reason it can enter into such stipulations under the Hepburn Act as to loss, damage, or injury suffered on the line of the connecting carrier."

If, as stated by Justice Battle, a stipulation of the kind in question is not in violation of a state statute which prohibits a carrier from restricting its common law liability by contract, there can

371 be no answer to the proposition that such a stipulation is not in violation of the Carmack Amendment. That stipulations, fixing the value of property in case of loss, are not contracts exempting from liability, is so thoroughly settled by the decisions of the

Supreme Court of the United States and by the Appellate Courts of Missouri, referred to in our brief, that we believe it would be a useless consumption of time to again refer to them at length. The case of Mires vs. Frisco R. R., 114 S. W., 1052 fully discusses the Missouri case; and the case of Hart vs. Penn. R. R. 112 U. S. 331, leaves nothing to be said as to the rule which prevails in the Supreme Court of the United States. The Court of Civil Appeals in its opinion in this case does not allude to this question or to these cases, and we therefore assume that it did not intend to call in question the soundness of either of them.

That the validity of this clause of the contract is to be determined either by the decisions in Missouri, or by the decisions of the United States Supreme Court is not an open question in this state. The decision of our Supreme Court in the case of C. R. I. & P. Ry. Co. vs. Thompson, 100th Tex., 185, is confined exclusively to a discussion of the question as to which law governs contracts similar to the one in question, and the conclusion is emphatically announced that they are to be governed by the law of the state where the contract was made, and especially is this so where the injury was received in the same state. This may be modified by the fact that we are now construing an Act of Congress, and if so the decisions of the Supreme Court of the United States would govern, which are the same as those of Missouri. Both courts hold that contracts of this kind are not contracts limiting liability, but are simply contracts pro-
372 viding a means for ascertaining the amount of a loss without the necessity of litigating that question to final judgment in the court of last resort.

In passing upon this assignment the Court of Civil Appeals seems to confine itself exclusively to the Texas decisions which hold invalid contracts fixing the value of property lost by the negligence of the carriers and lays much stress upon the case of Railway Co. vs McIntyre, 82 S. W., 346, which involved shipment from South Carolina to Texas, the loss occurring in Texas. Even if it be conceded that the McIntyre case was correct in holding that the Texas court would not be governed by the laws of South Carolina where the contract was made in a case where the delivery was to be made in Texas and the loss occurred in Texas, it would not by any means follow that the law of Missouri should not be applied in a Texas court where the contract was made and the loss occurred in Missouri, which is this case. We suppose it will not be seriously contended that in the case last stated the trial must be had upon question of liability in the Texas courts exactly as it should be were the trial being had where it properly belonged, in the Missouri courts. We do not think it would be permissible for us to add to what is said in the Thompson case upon this subject.

We do not think the Court of Civil Appeals meant what the language of the opinion implies where it says, in speaking of the McIntyre case: "In that case the Bill of Lading recited that the provision was made in consideration of reduced rate at which the goods were shipped. In the instant case there was in fact no reduction in the rate at which the cattle were to be carried and no

consideration for the limitation." The bill of lading in the
373 instant case was in the exact language of the bill of lading considered by the Missouri Court in the Mires vs. Frisco case referred to above and contained the following recital:

This Company Has Two Rates on Live Stock.

"Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk as per conditions herein set forth with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted, and understood to be less than published tariff rate applied thereon when transported at carrier's risk. All kinds of live stock, carrier's risk, will be taken under the provisions and at the rates provided for by existing tariffs and classifications." Steno.'s Report, 149.

And the Interstate Tariff referred to in the above provision contained the following:

"Limitation of liability rates provided on live stock will apply only on shipments made at owner's risk, with limitations of liability on the part of the Railroad Company as common carrier under the terms and conditions of the current live stock contract provided by this Company, the contract to be first duly executed in manner and form provided herein. 120 per cent. of the rates named in this tariff will be charged on shipments made without limitations of carrier's liability at common law and under this status shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein.' Steno.'s Report, 157.

374 Plaintiff's shipment was under the limited liability contract and he paid the rate therein provided. This, we think, brings the case squarely within that of Mires vs. Frisco and if the Missouri decisions are to govern, the question must be considered at an end.

But it may be contended that upon this question an Act of Congress is involved and therefore the decisions of the Supreme Court of the United States should control. If so, those decisions are as much in point against the conclusion of the Court of Civil Appeals as are those of the Missouri Courts. Cau vs. Texas & Pacific R. R. Co., 194 U. S., 427; Arthur vs. Texas & Pacific Ry. Co., 204 U. S., 505.

The only question, therefore, which remains is, whether the decision of the Court of Civil Appeals in the McIntyre case applying the rule of decision in Texas to a contract made in South Carolina, for the shipment of goods into Texas, the loss occurring in said latter state, shall be extended so as to apply the rule of decision in Texas to a case where the contract was made in Missouri, and the loss occurred in that state on the line of the carrier which made the contract.

IV.

The Court of Civil Appeals erred in overruling appellant's fourth assignment of error, as follows:

Fourth Assignment of Error.

"Eighth. The court erred in paragraph No. 6-*a* of its main charge to the jury: 'The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.'"

375 V.

The Court of Civil Appeals erred in overruling appellant's fifth assignment of error, as follows:

Fifth Assignment of Error.

"Tenth. The court erred in section No. 7, of its main charge to the jury, as follows: 'The undisputed evidence on this issue shows that within thirty days after the loss of plaintiffs' cattle in said wreck one of defendant's agents met plaintiff, R. L. Harriman, at Bunecton, Missouri, said agent going to said place in response to a letter from said Harriman requesting a conference *from* defendant in reference to this claim for damages; that at this conference the said Harriman delivered to said agent of defendant such written notice of his claim as was required by said stipulation in the contract; that some days afterwards these same parties had another conference over plaintiffs' claim for damages in the city of Sedalia, Missouri; that at this conference the said R. L. Harriman took from the possession of defendant's said agent the written claim that had heretofore been given to said agent; that said written claim was taken from said agent without his consent and against his will.

Now, if you believe from the evidence that the said agent, after he received the written claim for damages from plaintiffs, took said claim and from the information said claim furnished, made such an investigation of plaintiffs' claim for damages that caused him to seek the interview with the said R. L. Harriman in the city of Sedalia, and that at said interview he announced to the said Harriman his final conclusion in reference to said claim, you are instructed that plaintiffs fully complied with the stipulation in said contract as to the thirty days' notice.'"

376 VI.

The Court of Civil Appeals erred in overruling appellant's sixth assignment of error, as follows:

Sixth Assignment of Error.

"Eleventh. The court erred in Section 10 of its main charge to the jury, as follows: 'If you find for plaintiffs you will find for them in such sum as you believe from the evidence was the fair cash market

value of the 13 head of cattle; in the city of Enid, Oklahoma, at the time they would have arrived there had not such train been wrecked, together with the cash market value of the said herdsman's outfit.' "

VII.

The Court of Civil Appeals erred in overruling appellant's seventh assignment of error, as follows:

Seventh Assignment of Error.

"Fourteenth. The court erred in refusing to give to the jury special charge No. 3, requested by defendant, as follows: 'In the contract under which the cattle in question were being carried it is provided that as a condition precedent to their right to recover any damages for any loss or injury to said stock, plaintiffs should within 30 days after the happening of the injuries complained of, file with some freight or station agent, of the defendant his claim therefor giving the amount, and that no damages can be recovered except those set forth in the required claim, and you are instructed that such provision is valid and binding, both under the laws of Missouri and under the acts of Congress of the United States, entitled 'An Act to Amend an Act,' entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Inter-
state Commerce Commission, approved June 29th, 1906; and
377 an act entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, and inasmuch as there is neither allegation nor evidence in this case as to the amount of such claim filed you will find in favor of the defendant.' "

VIII.

The Court of Civil Appeals erred in overruling appellant's eighth assignment of error, as follows:

Eighth Assignment of Error.

"Fifteenth. The court erred in refusing to give to the jury special charge No. 4, requested by the defendant, as follows: 'In the contract under which the cattle in question were being carried, it is provided that no suit should be brought by plaintiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding, and you are instructed that the validity of said provision must be determined by the Act of Congress of the United States, entitled 'An Act to Amend an Act,' entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29th, 1906, and by an act entitled 'An Act to Regulate Commerce,' and that under said acts said provision is valid and binding; and

inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant.' "

IX.

The Court of Civil Appeals erred in overruling appellant's ninth assignment of error, as follows:

378 *Ninth Assignment of Error.*

"Sixteenth. The court erred in refusing to give to the jury special charge No. 6, requested by the defendant, as follows: 'In the contract, under which the cattle in question were being carried, it is provided that in case of any loss or injury to said stock, plaintiffs should within thirty days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that their failure to comply with such requirement should absolutely defeat and bar any cause of action for any injuries resulting to said stock, and you are instructed that under the laws of Missouri, where said contract was made and where the wreck occurred, said provision is valid and binding, and if you believe from the evidence that such claim was filed by plaintiffs, but subsequently taken from defendant without its consent, and that defendant notified plaintiffs that such taking of said claim would be treated as a withdrawal thereof by them, and notwithstanding such notice plaintiffs have ever since kept and retained the same, you will find that said provision of the contract was not complied with by plaintiffs, and you will return your verdict in favor of defendant.' "

X.

The Court of Civil Appeals erred in overruling appellant's tenth assignment of error, as follows:

Tenth Assignment of Error.

"Seventeenth. The court erred in refusing to give to the jury special charge No. 7, requested by defendant, as follows: 'In the contract, under which the cattle in question were being carried, it is stipulated and agreed that each bull did not exceed in value $30.00 and that each cow did not exceed in value $20.00, and that in case of any loss or damage, thereto plaintiffs should not be entitled
379 to recover more than such stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the acts of Congress of the United States, and especially by the act entitled 'An Act to Amend an Act, entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29th, 1906, and by the Act entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case

you find for plaintiff- in arriving at the amount of your verdict you will not allow for any one bull more than $30.00, nor for any one cow more than $20.00.'"

XI.

The Court of Civil Appeals erred in overruling appellant's eleventh assignment of error, as follows:

Eleventh Assignment of Error.

"Eighteenth. The court erred in refusing to give to the jury special charge No. 8, requested by the defendant, as follows: 'In the contract, under which the cattle in question were being carried, it is agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto, plaintiffs, should not be entitled to recover more than said amount and you are instructed that under the laws of Missouri, where the contract was made and the wreck occurred, such agreement is valid and binding, and in case you find in favor of plaintiffs, in arriving at the amount of your verdict, you will not allow for either one of the bulls more than $30.00, nor for either one of the cows more than $20.00.'"

380 XII.

The Court of Civil Appeals erred in overruling appellant's twelfth assignment of error, as follows:

Twelfth Assignment of Error.

"Nineteenth. The court erred in refusing to instruct the jury not to consider the remarks made by plaintiffs' counsel in his closing argument to the jury, because the same were not supported by the evidence, as shown by defendant's bill of exceptions No. 1.'"

XIII.

The Court of Civil Appeals erred in overruling appellant's thirteenth assignment of error, as follows:

Thirteenth Assignment of Error.

"Twentieth. The court erred in admitting the testimony of the witness Albert Harriman over defendant's objections thereto, as shown by defendant's bill of exceptions No. 2.'"

Remarks.

The question presented by this assignment is an important one. The Court of Civil Appeals, in effect, holds that if a party, without objection, permits one witness to state his opinion upon a hypothetical question, he is thereby precluded from objecting to the admission

of the opinion of any other witnesses upon the same or similar question, and that this goes to the extent of precluding him from introducing any witness of his own to give their opinions based upon a similar question, even though he may have strenuously objected to all of the testimony offered by the opposite party upon the same point.

It seems to us that this decision is an entirely illogical one and is not supported by the decisions relied upon. In the case at
381 bar appellant strenuously objected to plaintiffs' witnesses being allowed to base their opinions as to the value of these cattle upon the broad and indefinite statement that they were "show cattle" and its repeated objections to this class of evidence were overruled by the trial court. It was thus confronted with the necessity of either resting its entire case upon the soundness of its objection to this evidence and in case of mistake thereby subjecting itself to an exaggerated verdict, or attempt to parry the effect of the exorbitant estimates places by plaintiffs' witnesses upon the value of "show cattle" by introducing other disinterested witnesses upon the same question. The Court of Civil Appeals holds that appellant had no alternative but was compelled to rely upon the correctness of its objection, and in case of mistake submit to an exorbitant verdict, or waive its objection and submit to a verdict based upon what it believed to be illegal and improper evidence.

XIV.

The Court of Civil Appeals erred in overruling appellant's fourteenth assignment of error, as follows:

Fourteenth Assignment of Error.

"Twenty-first. The court erred in admitting the testimony of the witness, Albert Harriman, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 3."

XV.

The Court of Civil Appeals erred in overruling appellant's fifteenth assignment of error, as follows:

Fifteenth Assignment of Error.

"Twenty-second. The court erred in admitting the testimony of the witness, Albert Harriman, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 4."

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XVI.

The Court of Civil Appeals erred in overruling appellant's sixteenth assignment of error, as follows:

Sixteenth Assignment of Error.

"Twenty-fifth. The court erred in admitting the testimony of the witness, Ed. Patterson, over defendant's objections thereto, as shown by defendant's bill of exceptions No. 7.

XVII.

The Court of Civil Appeals erred in overruling appellant's seventeenth assignment of error, as follows:

Seventeenth Assignment of Error.

"Twenty-seventh. The court erred in admitting the testimony of Chas. E. Leonard, over defendant's objections thereto, as shown by its bill of exceptions No. 9."

XVIII.

The Court of Civil Appeals erred in overruling appellant's eighteenth assignment of error, as follows:

Eighteenth Assignment of Error.

"Thirty-third. The court erred in admitting the testimony of the witness, William A. Betterage, over defendant's objections thereto, as shown by its bill of exceptions No. 15.

XIX.

The Court of Civil Appeals erred in overruling appellant's nineteenth assignment of error, and its first proposition thereunder, as follows:

Nineteenth Assignment of Error.

"Thirty-fourth. The court erred in admitting the testimony of Wm. A. Betteridge over defendant's objections thereto, as shown by its bill of exceptions No. 16."

383 *First Proposition, said Assignment.*

"Where the value of an animal is made to depend upon its pedigree, the statement of a witness that "she was sired by what was conceded to be the greatest bull in the world," is purely an opinion and conclusion of the witness, and should be excluded when objected to as such; and when insisted upon by the party offering it, and admitted by the court as legal and proper evidence, the error in its admission necessitates a reversal."

Remarks.

The court in its opinion entirely ignores this assignment. We regard the assignment as absolutely unanswerable and wish to be understood as strenuously insisting thereon. We believe the evidence, which was held to be admissible, was as purely an opinion and conclusion of the witness as it is possible for evidence to be. We have found no case, which holds such an opinion to be admissible, and appellees have cited none in their brief.

XX.

The Court of Civil Appeals erred in overruling appellant's twentieth assignment of error, as follows:

Twentieth Assignment of Error.

"Forty-first. The court erred in admitting the testimony of J. F. Stodder over the objections of defendant as shown by its bill of exceptions No. 23."

XXI.

The Court of Civil Appeals erred in overruling appellant's twenty-first assignment of error, as follows:

384 *Twenty-first Assignment of Error.*

"Forty-second. The court erred in admitting the testimony of R. L. Harriman over defendant's objections thereto, as shown by its bill of exceptions No. 24."

XXII.

The Court of Civil Appeals erred in overruling appellant's twenty-second assignment of error, as follows:

Twenty-second Assignment of Error.

"Forty-third. The court erred in admitting the testimony of the witness R. L. Harriman, over defendant's objections thereto, as shown by its bill of exceptions No. 25."

XXIII.

The Court of Civil Appeals erred in overruling appellant's twenty-third assignment of error, and its first proposition thereunder, as follows:

Twenty-third Assignment of Error.

"Forty-fourth. The court erred in admitting the testimony of the witness, R. L. Harriman, over defendant's objections thereto, as shown by its bill of exceptions No. 26."

First Proposition, said Assignment.

"The statement of a witness that 'It is a matter of record and my opinion that he (the bull in question) sired more show cattle in two seasons than any bull we know of in America,' is only the opinion and conclusion of the witness in reference to a matter not the subject of opinion evidence, and without a sufficient statement of facts, and the admission of such evidence by the court as legal and proper constitutes reversible error.

Remarks.

We desire to make exactly the same remarks with reference to this assignment that we have made above under appellant's
385 nineteenth assignment of error. The Court of Civil Appeals entirely ignored this assignment in its opinion and we therefore, can form no idea of the ground upon which its conclusion is based. The question is certainly squarely presented whether evidence of the kind here complained of is or is not admissible in cases of this kind. Appellees considered the evidence as material and important; the trial court so regarded it and passed upon the legal question presented adversely to appellant. There can be no question but that the evidence, if erroneously admitted, was of such a nature as to require a reversal of the judgment.

XXIV.

The Court of Civil Appeals erred in overruling appellant's twenty-fourth assignment of error, and its first proposition thereunder, as follows:

Twenty-fourth Assignment of Error.

"Forty-fifth. The court erred in admitting the testimony of the witness, R. L. Harriman, over defendant's objections thereto, as shown by its bill of exceptions No. 27."

First Proposition, said Assignment.

"Where the petition only contains a general allegation of damages measured by the value generally of the animal, evidence is not admissible that some part of them less than the whole when formed into a show herd, have a greater value than if considered separately as individuals."

XXV.

The Court of Civil Appeals erred in overruling appellant's twenty-fifth assignment of error, as follows:

Twenty-fifth Assignment of Error.

"Fifty-ninth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to sup-
386 port it in finding that there was a market value for plaintiff's cattle at the city of Enid, Okla., at the time they were killed."

XXVI.

The Court of Civil Appeals erred in overruling appellant's twenty-sixth assignment of error, as follows:

Twenty-sixth Assignment of Error.

"Sixtieth. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it in finding

that the market value of plaintiffs' thirteen head of cattle and their herdsman's outfit at the time they would have arrived at the city of Enid, Okla., amounted to the sum of $10,640.00."

XXVII.

The Court of Civil Appeals erred in overruling appellant's twenty-seventh assignment of error, as follows:

Twenty-seventh Assignment of Error.

"Sixty-second. The verdict of the jury is against the great preponderance of the evidence, and is without evidence to support it, in finding thtat what is termed plaintiffs' show cattle, viz: The bull, Golden Crown, the heifer, Lavinia, the heifer, Golden Bessie, the heifer, Golden Acorn, the heifer, Golden Thistle, the bull, Royal Crown, had a cash market value at Enid, Okla."

XXVIII.

The Court of Civil Appeals erred in overruling appellant's twenty-eighth assignment of error, as follows:

Twenty-eighth Assignment of Error.

Sixty-third. The verdict of the jury is grossly excessive in amount in that under the allegations of plaintiffs' petition the value of each of the thirteen head of cattle must be taken as the same, no
387 one exceeding one-thirteenth part of $15,000.00 and when so considered, the highest amount which any of the evidence will authorize cannot exceed $7,000.00."

Appellees' attorneys are W. M. Williams, who resides at Booneville, in Cooper County, State of Missouri, and Wolfe, Hare & Maxey, a partnership composed of J. A. L. Wolfe, Silas Hare and Rice Maxey, all of whom reside at Sherman, in Grayson County, State of Texas.

COKE, MILLER & COKE,
HEAD, DILLARD, SMITH & HEAD,
Attorneys for Appellant, Missouri, Kansas & Texas Railway Co.

Filed in Court of Civil Appeals Apr. 28, 1910, Geo. W. Blairk, Clerk 5th District.

Filed in Supreme Court Jun- 14, 1910, F. T. Connerly, Clerk.

Order of Court Overruling Motion for Rehearing.

5212.
6060.

MO., KAN. & TEXAS RY. CO.
VS.
HARRIMAN BROS.

SATURDAY, *May 14th*, 1910.

This day came on to be heard the motion of appellant for rehearing of this cause and the same being inspected, it is considered, adjudged and ordered that the said motion be overruled.

388 *Order of Supreme Court Refusing Writ of Error.*

Filed 6, 27, '10.

M., K. & T. RY. CO.
VS.
HARRIMAN BROS.

From Grayson County, 5th District.

JUNE 22*nd*, 1910.

This day came on to be heard the application of M. K. & T. Ry. Co. for a writ of error to the Court of Civil Appeals for the Fifth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant, Missouri, Kansas & Texas Railway Company and its surety National Surety Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 25th day of June, A. D. 1910.

[SEAL.]

F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Filed in Court of Civil Appeals Jun- 27, 1910, Geo. W. Blair, Clerk 5th District.

389 *Petition for Writ of Error.*

Filed 7, 16. '10.

In the Supreme Court of the United States.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
HARRIMAN BROS., Defendants in Error.

To the Supreme Court of the United States:

The petition of the Missouri, Kansas & Texas Railway Company, a corporation incorporated under the laws of the State of Kansas, having its principal place of business in the City of Parsons, County of La Bette and State of Kansas, plaintiff in error in the above entitled cause, respectfully shows to this court that on the 13th day of February, A. D. 1909, a judgment was rendered in the District Court of Grayson County, Texas, against it for the sum of Ten Thousand Six Hundred Forty ($10,640.00) Dollars in favor of Robert L. Harriman and Albert C. Harriman, composing the firm and co-partnership of Harriman Brothers, defendants in error.

Pursuant to the civil statutes of the State of Texas said cause was appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas where, on the 16th day of April, A. D. 1910, said judgment was affirmed; that afterwards pursuant to the provisions of the civil statutes of Texas a motion for rehearing in said cause was presented to said Court of Civil Appeals and was by it on the 14th day of April, A. D. 1910, overruled; that afterwards and pursuant to the civil statutes of the State of Texas it filed in the Court of Civil Appeals, and caused to be presented to the Supreme Court of Texas, a petition for a writ of error to review
390 said cause, which petition was by said Supreme Court refused on the 22nd day of June, A. D. 1910, and the said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas is the highest court of said State in which a decision of this kind could be had.

In the said action, rights, privileges and immunities were claimed by your petitioner under the constitution and statutes of the United States and under the authority exercised under the United States, and the decision of the said Court of Civil Appeals was against the rights, privileges and immunities specially set up and claimed under said constitution, statutes and authority, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore, said Missouri, Kansas & Texas Railway Company prays that a writ of error may issue to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas for the correcting of the errors complained of and a duly authenticated transcript of

the record, proceedings and papers herein may be sent to the United States Supreme Court.

COKE, MILLER & COKE,
HEAD, DILLARD, SMITH & HEAD,
Attorneys for Plaintiff in Error,
The Missouri, Kansas & Texas Railway Company.

CECIL A. SMITH,
Of Counsel.

The writ of error as prayed for in the foregoing petition is hereby allowed this 4th day of July, A. D. 1910, the writ of error to
391 operate as a supersedeas and a bond for that purpose is fixed at the sum of Twenty Five Thousand ($25,000) Dollars.

EDWARD D. WHITE,
Justice of the Supreme Court of the United States.

Filed in Court of Civil Appeals Jul- 16, 1910. Geo. W. Blair, Clerk 5th District.

Bond for Writ of Error.

Filed 7, 16, '10.

In the Supreme Court of the United States.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
HARRIMAN BROTHERS, Defendants in Error.

Know all men by these presents: That we, the Hissouri, Kansas & Texas Railway Company, a corporation incorporated under the laws of the State of Kansas, having a principal place of business in the City of Parsons, County of La Bette and State of Kansas, as principal, and American Surety Company of New York, a corporation organized and existing under and by cirtue of the laws of the State of New York, and having an office and regular place of business in the City and County of Dallas and State of Texas, as surety, are held and firmly bound unto Robert L. Harriman and Albert C. Harriman, composing the firm and co-partnership of Harriman Brothers, defendants in error, in the sum of Twenty-five Thousand
392 ($25,000.00) Dollars, lawful money of the United States of America, to the payment of which well and truly to be made the said principal and the said surety bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of July, in the Year of our Lord, One Thousand, Nine Hundred and Ten.

Whereas, in the District Court of Grayson County, Texas on the 13th day of February, A. D. 1909, Robert L. Harriman and Albert C. Harriman, composing the firm and co-partnership of Harriman

Brothers, the above named defendants in error, recovered a judgment against the Missouri, Kansas & Texas Railway Company, plaintiff in error, for the sum of $10,640.00 which judgment on appeal was by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas on the 16th day of April, A. D. 1910, affirmed, and the above named Missouri, Kansas & Texas Railway Company, plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above cause by the said Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its writ of error to effect and answer all costs and damages that may be adjudged,
393 if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

MISSOURI, KANSAS AND TEXAS RAILWAY CO.,
By HEAD, DILLARD, SMITH & HEAD,
Its Attorneys.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By W. E. WILKIN, *Resident Vice-President.*
J. W. ADAMS, *Resident Assistant Secreta-.*

This bond approved this, 11th day of July, A. D. 1910.

EDWARD D. WHITE,
Associate Justice.

Filed in Court of Civil Appeals Jul- 16, 1910, Geo. W. Blair, Clerk 5th District.

394 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Missouri, Kansas & Texas Railway Company, appellant, and Robert L. Harriman and Albert C. Harriman, composing a firm and co-partnership of Harriman Brothers, appellees, wherein was drawn in the question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of

such their validity; or wherein was drawn in question
395 the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the eleventh day of July, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by:

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

396 UNITED STATES OF AMERICA, *ss:*

To Robert L. Harriman and Albert C. Harriman, composing a firm and co-partnership of Harriman Brothers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas, wherein Missouri, Kansas & Texas Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this eleventh day of July, in the year of our Lord one thousand nine hundred and ten.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

We hereby acknowledge the receipt of a copy of the foregoing citation, this July 15, 1910

W. M. WILLIAMS,
WOLFE, HARE & MAXEY,
Attorneys for Robert L. Harriman and Albert C. Harriman, Def'ts in Error.

397 *Assignment of Errors.*

Filed 7, 16, '10.

In the Supreme Court of the United States.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
HARRIMAN BROTHERS, Defendants in Error.

Now comes the Missouri, Kansas & Texas Railway Company, plaintiff in error, in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas erred to the grievous injury and wrong of the plaintiff in error, and to the prejudice and against the rights of the plaintiff in error, in the following particulars, to-wit:

I.

The Court of Civil Appeals erred in holding that under the provisions of Section 20, of the Act of Congress of June 29, 1906, known as the Hepburn Act, the stipulation in the contract for the transportation of live stock made in January, 1907, out of which this suit arises, fixing the value of the live stock in case of loss, or damage in shipment, is invalid.

II.

The Court of Civil Appeals erred in holding that Section 20, of the Act of Congress of June 29, 1906, known as the Hepburn Act, is not unconstitutional as being in contravention of the Fifth Amendment to the Federal Constitution, but is a valid statute.

398 III.

The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error: The trial court erred in paragraph 6-*b* of its main charge to the jury, as follows:

"Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

IV.

The Court of Civil Appeals erred in holding that where a contract is made in the State of Missouri for a shipment of live stock into Oklahoma in January, 1907, and the contract contains a stipulation that suit for any damages growing out of the contract must be commenced within ninety (90) days, and where suit is commenced in the State of Texas for damages growing out of such contract more than ninety (90) days after the same arose that such stipulation is governed by the laws of Texas, and is therefore invalid, instead of holding that same is governed by the Act of Congress and valid, by which holding plaintiff in error was denied the rights secured to it by its contract made under said Act of Congress.

V.

Congress by the provisions of the Act of June 29, 1906, known as the Hepburn Act, having regulated the transportation of Interstate Commerce, and having placed no restrictions on the making of contracts providing a time within which suit growing out of the transportation of the same may be brought, the Court of
399 Civil Appeals erred in holding that where a contract is made in the State of Missouri for a shipment of live stock into Oklahoma in January, 1907, and the contract contains a stipulation that suit for any damages growoing out of the contract must be commenced within ninety (90) days, and where suit is commenced in the State of Texas for damages growing out of such contract more than ninety (90) days after the same arose that such stipulation is not valid.

VI.

The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error: The trial court erred in paragraph 6-*a* of its main charge to the jury, which is as follows:

"The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein."

VII.

The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error:

The trial court erred in refusing to give to the jury special charge No. 3 requested by plaintiff in error, as follows:

"In the contract under which the cattle in question were being carried it is provided that as a condition precedent to their right to recover any damages for any loss or injury to said stock, plaintiffs should within 30 days after the happening of the injuries complained of, file with some freight or station agent of the defendant his claim therefor, giving the amount, and that no damages
400 can be recovered except those set forth in the required claim, and you are instructed that such provision is valid and bind-

ing, both under the laws of Missouri and under the acts of Congress of the United States, entitled 'An Act to Amend an Act,' entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' approved June 29th, 1906; and an act entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, and inasmuch as there is neither allegation nor evidence in this case as to the amount of such claim filed, you will find in favor of the defendant."

VIII.

The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error:

"The trial court erred in refusing to give to the jury special charge No. 4, requested by plaintiff in error, as follows:

"In the contract, under which the cattle in question were being carried, it is provided that no suit should be brought by plaintiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding, and you are instructed that the validity of said provision must be determined by the act of Congress of the United States, entitled 'An Act to Amend an Act,' entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29th, 1906, and by an act entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, and that under said acts said provision is valid and binding; and inas-
401 much as this suit was not commenced within the said ninety days, you will find in favor of the defendant."

IX.

The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error:

The trial court erred in refusing to give to the jury special charge No. 7, requested by plaintiff in error, as follows:

"In the contract, under which the cattle in question were being carried, it is stipulated and agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than such stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the acts of Congress of the United States, and especially by the Act entitled 'An Act to Amend an Act,' entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29th, 1906, and by the Act entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiffs in arriving at the amount of your verdict you will

not allow for any bull more than $30.00, nor for any cow more than $20.00."

X.

The Court of Civil Appeals erred in not reversing and rendering the judgment rendered in this cause by the trial court for the plaintiff in error.

402 Wherefore, for this and other manifest errors appearing in the record the said Missouri, Kansas & Texas Railway Company, plaintiff in error, prays that the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error granting it its rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for its costs.

COKE, MILLER & COKE,
HEAD, DILLARD, SMITH & HEAD,
Attorneys for Plaintiff in Error, The Missouri, Kansas & Texas Railway Company.

CECIL H. SMITH,
Of Counsel.

I, George W. Blair, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the assignment of errors filed by plaintiff in error in this court on this day.

Given under my official signature and seal this June 29, A. D. 1910.

[SEAL.] GEO. W. BLAIR,
Clerk Court Civil Appeals for the Fifth Supreme Judicial District of Texas.

Filed in Court of Civil Appeals Jul. 16, 1910, Geo. W. Blair, Clerk 5th District.

403 *Statement of Costs.*

Cost accrued in District Court	$252.45
Cost accrued in Supreme Court	7.00
Cost accrued in Court Civil Appeals	196.50
	$455.95

404 *Clerk's Certificate.*

THE STATE OF TEXAS:

I, Geo. W. Blair, Clerk of the Court of Civil Appeals in and for the Fifth Supreme Judicial District of Texas, do hereby certify that the foregoing 404 pages contain a true copy of the transcript of the record and statement of facts sent up from the District Court of Gray-

son County, Texas, and the Opinion, Judgment, Motion for Rehearing and Order overruling said Motion in the Court of Civil Appeals and the Judgment of the Supreme Court of Texas refusing Writ of Error, and the Petition for Writ of Error to the Supreme Court of the United States, Bond for Writ of Error, and Assignment of Errors, now on file and of record in my office, and also the Original Writ of Error and Original Citation to the United States Supreme Court and a correct Statement of the Costs accrued in the District Court, Court of Civil Appeals and Supreme Court in the case of Missouri, Kansas and Texas Railway Company vs. Harriman Bros., No. 6060 on the Docket of this Court.

Given under my hand and seal of office at Dallas, Texas, this 3d day of August 1910.

[Seal Court of Civil Appeals of the State of Texas.]

GEO. W. BLAIR, *Clerk.*

Endorsed on cover: File No. 22,295. Texas Court of Civil Appeals, 5th Supreme Judicial District. Term No. 376. Missouri, Kansas & Texas Railway Company, plaintiff in error, vs. Robert L. Harriman and Albert C. Harriman, composing a firm and copartnership of Harriman Brothers. Filed August 12th, 1910. File No. 22,295.

2

Office Supreme Court, U. S.
FILED.
NOV 13 1912
JAMES H. McKENNEY
Clerk.

NUMBER 121.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

ROBERT L. HARRIMAN AND ALBERT C. HARRIMAN, COMPOSING A FIRM AND CO-PARTNERSHIP OF HARRIMAN BROTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

ALEX. S. COKE,
HEAD, SMITH, HARE & HEAD,
Attorneys for Plaintiff in Error, Missouri, Kansas & Texas Railway Company.

JOS. M. BRYSON,
CECIL H. SMITH,
Of Counsel.

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NUMBER 121.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

ROBERT L. HARRIMAN AND ALBERT C. HARRIMAN, COMPOSING A FIRM AND COPARTNERSHIP OF HARRIMAN BROTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

STATEMENT.

On February 9, 1909, defendants in error instituted this suit in the District Court of Grayson County, Texas, against plaintiff in error and alleged:

Petition of Defendants In Error.

"That heretofore, to-wit: On or about the 30th day of January, 1907, plaintiffs delivered to defendant at Pilot Grove, Missouri, a station on one of its lines of railway, thirteen head of fine show

and sale cattle to be by it transported to Enid in the State of Oklahoma, and at the same time paid to defendant the tolls and charges for such service. That plaintiffs at the same time delivered to defendant certain herdsmen's tools, blankets, halters and other equipment used in and about the handling of said cattle. That defendant accepted and received the property above mentioned in its capacity of a common carrier and as such, undertook its transportation from and to points above mentioned.

Plaintiffs show to the court that said defendant failed to comply with its said undertaking in that: near the station of Nevada, in the State of Missouri, the train upon which said cattle were being transported was wrecked, and each and all of said cattle killed and the equipment of plaintiffs on said train was lost and destroyed.

Plaintiffs show to the court that said wreck was caused by the gross negligence of defendant in this: Said defendant was negligent in that its roadbed was in bad state of repair, and a certain bridge over which said railway was constructed was old, decayed and insufficient to bear the weight of said train so that said train was derailed and precipitated through said bridge.

That the operatives of said train were guilty of negligence in that said train was run at a high, excessive and dangerous rate of speed, causing the same to be derailed.

That the equipment including the cars, brakes, brake-beams, brake shoes, their hangings and fastenings, were old, worn and out of repair, so that some portion thereof became detached and falling upon the tract caused said train to be derailed.

That said defendant was further guilty of negligence in that it failed to properly inspect and repair its said roadbed, bridge, cars, braking appliances, the hangings and connections thereof, and plaintiffs charge that if it had used ordinary care

the defective conditions would have been discovered and would, in the exercise of ordinary care have been repaired.

Plaintiffs show to the court that each and all of the cattle aforesaid, were cattle of the highest grade, breed and quality, and were very valuable, all of which facts were well known to defendant. That said cattle were of the reasonable value, were worth and their reasonable cash value was the sum of ($15000) fifteen thousand dollars, and said equipment was of the reasonable value of one hundred ($100.00) dollars.

That by reason of the loss and destruction of all the property above mentioned, through defendant's negligence as hereinbefore alleged, plaintiffs have been damaged in the sum of $15,100.00, which though demanded of defendant it has refused to pay" (Rec. 1-2).

On February 8, 1909, plaintiff in error filed its amended answer, which after demurrer, was in part as follows:

Plaintiff in Error's Answer.

"Third. Defendant for general answer to plaintiff's petition, denies every allegation therein contained and demands strict proof thereof.

"Fourth. Defendant says that the contract by and between plaintiff and defendant with reference to the carriage of said stock was in writing, duly executed by all of the parties to this suit, acting for themselves or by their duly authorized agents, in the State of Missouri, by the laws of which state, said contract was and is in all its provisions legal, binding and valid; that said contract was for the transportation of said cattle from Pilot Grove, Missouri, to Guthrie, in what was then Oklahoma Territory, now Oklahoma State; which shipment there-

fore constituted interstate commerce and said contract was for the transportation of interstate commerce, and by the laws of the United States governing interstate commerce was and is in all its provisions valid and binding; that in said contract, among other things, it is stipulated as follows:

'This Company Has Two Rates on Live Stock.

'Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk as per conditions herein set forth, with the distinct understanding that said rate is a special rate which is hereby agreed to, accepted and understood to be less than published rate applying thereon when transported at carrier's risk.

'All kinds of live stock, carrier's risk, will be taken under the provisions and at rates provided for by existing tariffs and classification.'

'This agreement, entered into by and between the Missouri, Kansas & Texas Railway Company, and each carrier adopting it, hereinafter called the carrier, party of the first part, and Harriman Bros., hereinafter called the shipper, party of the second part, this 30th day of Jan'y, 1907, Witnesseth: The carrier agrees to let to the shipper one stock car, numbered 51476 P. M., which the shipper has selected and desires to use for the shipment of 13 head of cattle consigned to Harriman Bros. at Enid, Okla., and when loaded and delivered to carrier to haul the same, together with the shipper, party or parties in charge thereof, from Pilot Grove, Mo., to Guthrie, Okla., all as hereafter provided at the rate of (Do not insert any station beyond our line) ..... dollars per car, or ..... cents per hundred pounds, from ..... to destination, subject to minimum weights and length of car provided for in tariff, the same being a special rate, which the carrier guarantees, and less than the regular tariff rate applying on shipments of live stock not covered by the special contract.

'5. The carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting from his negligent doing or failure to do any of the things which he hereby contracts to do, or from the negligence of any of his servants.

'8. The carrier does not ship live stock or Emigrant Outfit under this contract or at the rate hereon given upon which its liability, in case of any loss or injury, shall exceed the following prices per head:

Each Horse (gelding, mare, stallion) Mule or jack	$100.00
Each pony or range horse	30.00
Each Ox, steer or bull	30.00
Each cow	20.00
Each calf or hog	7.00
Each sheep or goat	2.00

'Emigrant Outfit (not live stock) consisting of emigrant movables, household goods, second hand farm machinery, etc., when loaded with live stock, as per classification at valuation of not to exceed $5.00 per one hundred pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation or handling of said cars as aforesaid it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, that shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above.

'9. The shipper further expressly agrees that as a condition precedent to his right to recover any

damages for any loss or injury to said live stock resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train or the nearest station or freight agent of the carrier on whose line the injuries occur before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed from pens at destination. In his notice he shall state place and nature of the injuries to the end that they may be fully and fairly investigated, and said shipper shall within thirty days after the happening of the injuries complained of, file with some freight or station agent of the carrier on whose line the injuries occurred, his claim therefor, giving the amount, shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said live stock as aforesaid, and no suit shall be brought against any carrier, and only against the carrier, on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute of limitation to the contrary notwithstanding, and no damages can be recovered except those set forth in the required notice and claim.

'No agent of this company has any authority to waive, or amend, any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market, or furnish any particular kind of cars, or to furnish cars on any particular day, which the carrier hereby expressly declines to do.'

"Defendant says that plaintiff did not institute this suit or any suit on account of loss or injury to said live stock within 90 days, as required by the provisions of said contract; and he is therefore barred from maintaining this suit and defendant pleads such in bar hereof.

"Defendant says that said stock were not in-

jured or damaged in any way by negligence upon its part, but that the same were killed in a wreck of one of its trains in the course of transportation over its road, which wreck was not in any way due to any negligence upon the part of the defendant or any of its agents, or employes, but was due solely and only to an unavoidable accident, which could not have been foreseen or prevented by the exercise of due care and diligence on its part.

"Defendant says that if it be held liable to plaintiff in any amount, which it denies it should be, then it says that in any event, plaintiff is not entitled to recover, and cannot recover from it any more than the amounts agreed upon as the value of said stock in said contract; that under said provision of said contract said cattle were of the total value of four hundred and eighty ($480.00) dollars, which is the largest amount plaintiff can recover therefor of defendant in any event.

"Defendant says that said contract was entered into by and between parties for a valuable consideration, and was and is in all its provisions reasonable and plaintiff could easily have complied therewith on his part, had he desired or seen proper so to do" (Rec. 3-6).

On February 8, 1909, defendants in error filed their supplemental petition and rejoinder which, so far as pertaining to the questions involved in this case, is as follows:

Defendants' in Error Supplemental Petition and Rejoinder.

"6th. Plaintiffs specially excepts to all that portion of said answer which sets up that they had one rate which was charged for the shipment of said stock at the owner's risk and another and different rate when the same were transported at defendant's

risk, because rates are not set up in said answer nor alleged, nor is it shown that the same were in conformity with a schedule of rates filed by said defendant with the Interstate Commerce Commission, nor is there any allegation that said defendant had filed any rate whatever with said Commission.

"7th. Plaintiffs specially except to the allegations of said answer quoting from said alleged contract to the effect that defendant agreed to haul said live stock from Pilot Grove, Missouri, to Guthrie, Oklahoma, at the rate of ..... dollars per car or ..... cents per hundred pounds from ..... to destination subject to minimum rates and cars provided for in tariff, the same being a special rate which the carrier guarantees and which is less than the regular tariff rate applying on shipments of live stock not covered by this special contract, because what said special rate was is not alleged and if there was any other rate, it is not alleged, and if said provision of said contract was inserted under or by virtue of any tariff or schedule of rates filed with the Interstate Commerce Commission, the same is not alleged, nor is there any allegation as to what such charges were under any rates or schedule filed with said Commission.

"8th. Plaintiffs except to all that portion of said answer setting up the contents of the eighth provision of said alleged contract wherein it has attempted to limit its liability to a certain amount per head for the stock alleged to have been killed by it because it is not shown that said limitations were contained in any tariff or schedule of rates filed by it with the Interstate Commerce Commission, nor is there any allegation which shows or tends to show that defendant has a legal right to make such rate or limitation.

"Plaintiffs specially deny that the provisions to said alleged contract setting up a plea by defendant were valid or binding either under the laws of

the State of Missouri or under the laws of the United States regulating Interstate Commerce, but allege and charge that the same were illegal, null and void.

"Plaintiffs further specially deny that the happening of said accident was unavoidable or without negligence but they charge that the same were caused by the negligence of defendant as alleged in their original petition.

"Further replying to defendant's said answer, plaintiffs charge that there was no consideration for the execution of the written contract declared on by defendant, and therefore the same is null and void" (Rec. 7-9).

On February 9, 1909, the court sustained the sixth, seventh and eighth exceptions contained in defendants' in error supplemental petition (Rec. 12), and in order to meet the same, plaintiff in error filed its trial amendment, as a part of its pleadings in said case as follows:

Plaintiff in Error's Trial Amendment to its Petition.

"That it did have, at the time said shipment was made, two rates applicable to the shipment of said stock; that said two rates were duly and regularly established in accordance with the provisions of the Acts of Congress applicable thereto; that said two rates were provided for by tariff duly filed with and approved by the Interstate Commerce Commission and published by defendant as required by law long prior to said shipment, and that the same were regularly in force at the time thereof and applicable thereto; that in said tariff it is provided that the rate on cattle for a distance of 380 miles, that being the distance from Pilot Grove, Mo., to Guthrie, Okla., shall be 26½ cents per hundred weight on shipments where the carrier's liability is limited, as provided in defendant's live stock contract; in said tariff it is further provided as follows:

'Limitation of Liability. Rates provided on live stock contracts will apply only on shipments made at owner's risk with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract, provided by this Company, the contract to be first duly executed in manner and form provided for therein. One hundred and twenty (120%) per cent of the rates named in this tariff will be charged on shipments made without limitation of carrier's liability at common law, and under this status, shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein.'

"Defendant says that said shipment on account of which this suit is brought, was made upon said rate of 26½ cents per hundred weight, said rate being the rate under which defendant's liability should be limited in accordance with its regular form of live stock contracts as provided for in said tariff; that the consideration paid it, as alleged in plaintiff's petition for the transportation of said cattle was the consideration based upon said 26½ cents cwt. rate.

"Defendant says that plaintiffs, had they seen fit to do so, could have made said shipment upon said rate, as provided in said tariff without limitation of liability, in which event they would have had to pay 20 per cent more than they did pay; that said tariff was duly published by defendant and filed and posted at said station of Pilot Grove, and plaintiffs could have ascertained the rates provided for therein, had they seen fit to do so; that they had choice of making said shipment either with or without defendant's limitation of its liability and having accepted the lesser rate and having made said shipment under the rate as provided with limitation of liability and by contract imposing the same as pro-

vided by said tariff, they are bound by said contract and by said limitations provided therein.

"But defendant further says that whether it be true or not that it had two rates upon said shipment, duly provided by tariff, the rate which was quoted plaintiffs upon said shipment and upon which said shipment was made, was made and quoted with the understanding that defendant's liability would be limited as provided in its current form of live stock contract, and said rate would not have been quoted and said shipment would not have been accepted by it upon said rate except upon limitation of its liability as provided in said form of contract; that had plaintiff desired to ship said cattle without limitation of liability upon defendant's part he could have done so had he seen fit and defendant would have accepted and shipped said cattle upon that basis but the consideration for so doing would have been more than was paid by plaintiff upon said shipment and the rate would have been higher" (Rec. 9-10).

The cause was tried before a jury February 13, 1909, and the following facts were proven among others:

Facts Proven.

The trial court stated the undisputed evidence as follows:

"The undisputed evidence in this case shows that on or about the 30th day of January, 1907, Harriman Brothers, plaintiffs in this case, delivered to defendant, the M. K. & T. Ry. Co., at Pilot Grove, in the State of Missouri, thirteen head of cattle to be transported to Enid, Oklahoma; and that while said cattle were en route to their destination and while on defendant's line of railway, the train in which said cattle were being transported was wrecked near the town of Deerfield in said State of Missouri, and all of said cattle were killed; and that there was in said car of cattle, at the same time

what has been termed a 'Herdsman's Outfit,' belonging to plaintiffs, which was also lost in said wreck" (Rec. 13-14).

On the trial a written contract, executed by defendants in error, with plaintiff in error, for the shipment of the cattle from Pilot Grove, Mo., to Guthrie, Okla., as set out in plaintiff in error's answer, was introduced in evidence, on which contract there was written across the face "Paid 80.30" (Rec. 150-3).

A tariff from the files of the Interstate Commerce Commission was introduced in evidence, which is as follows:

"Missouri, Kansas & Texas Railway Co.
"The 'Katy' Route.
"Local Distance Tariff No. 2548.
"(Cancels No. 737)

"Applying on classes and commodities between stations on the Missouri, Kansas & Texas Ry. as follows:

"Between Stations in	And Stations In
Indian Territory	Oklahoma Territory
Missouri or Kansas	Indian Territory
Missouri or Kansas	Oklahoma Territory

"And locally between Stations in the Indian or Oklahoma Territories.

"Rates in Cents per 100 lbs.
"Cattle (See Rule 3.)

"Distance	Commodities—Carloads
380 miles and over 370	26½

"Rule 3.

"Live Stock—Continued.

"Limitation of Liability.—Rates provided on Live Stock will apply only on shipments made at Owner's Risk, with limitation of liability on the part

of the Railroad Company as common carrier under the terms and conditions of the current Live Stock contract provided by this company, the contract to be first duly executed in manner and form provided therein.

"120 per cent of the rates named in this Tariff will be charged on shipments made without limitations of carrier's liability at common law and under this status, shippers will have the choice of executing and accepting contracts for shipments of Live Stock with or without limitation of liability, the rates to be made as provided for herein" (Rec. 154).

L. G. Hunter testified:

"In January, 1907, I was agent at Pilot Grove for the M. K. & T. I am acquainted with Mr. Harriman and his nephew. I was agent there at the time they made a shipment of thirteen head of stock over defendant's road to Guthrie or Enid, Oklahoma. I was agent in charge of the station there at that time. I attended to the shipment in behalf of the railroad company."

(Witness is shown a contract on which the cattle were shipped), and says:

"That is the contract under which the cattle were shipped. I got the rate, under which the cattle were shipped, from the general freight agent. I gave it to Mr. Harriman. I am the one that quoted him the rate. I told Bert Harriman—no, I don't remember which one I told, but Mr. Bert Harriman paid it. Mr. Bert Harriman attended to the shipment. Mr. Bob Harriman ordered the car. The rate to Enid that the cattle were shipped on was thirty-six and one-half cents. The defendant's road ran from Pilot Grove to Guthrie, Oklahoma, and connected with the Enid road. I think it was the Denver and Gulf road, or Santa Fe from Guthrie to Enid. The rate on which the cattle were shipped from Pilot Grove to Guthrie was twenty-six and a

half cents. I didn't look it up to see if that rate is provided for by any tariff of the defendant. After the general freight agent told me what it was I didn't look it up. The general freight agent advised me on the rate. (Witness is handed another paper, and asked what it is.) This is a tariff, local distance tariff between those points in Missouri. I think the distance from Pilot Grove to Guthrie is two hundred and eighty miles. I have no way of telling for certain unless I figured it out. * * * It figures out just three hundred and eighty miles. The rate provided by this tariff that I have for shipments of cattle from Pilot Grove to Guthrie is twenty-six and a half cents. I don't know whether or not the Katy had any joint through rate from Pilot Grove to Guthrie. I got the rate of thirty-six and a half cents from the general freight agent, that rate being made up of twenty-six and a half cents over the Katy to Guthrie and ten cents beyond. The amount of freight that was paid by Harriman Brothers for that shipment was $80.30. That amount was based on this rate of twenty-six and a half cents to Guthrie and ten cents beyond. That is the rate which we use a live stock contract for. When I quoted that price, it was quoted with the expectation on my part that a live stock contract would be executed covering the shipment. This tariff does not show a rate to Enid. It shows a rate on a shipment to Guthrie going to Enid. It says twenty-six and a half cents. That is the lowest rate provided by this tariff. The rate of twenty-six and a half cents was the rate provided in cases where the regular form of live stock contract was issued. In billing out a car of that kind we use the minimum weight provided by the tariff. The minimum weight is in the tariff. We get the minimum weight from the general freight office. The minimum weight used on this shipment was twenty-two thousand pounds. That is what we charged for; charged

them twenty-six and a half cents per hundred pounds to Guthrie. The minimum weight is the weight we use, provided they don't weigh over that. We charge that in any event, even though it weighs less. If it weighed more we would charge on the surplus weight. Ordinarily thirteen head of cattle would not weigh over the minimum weight" (Rec. 155-6).

John W. Conner testified:

"In January, 1907, I was commercial agent for the M. K. & T. As commercial agent I solicited freight and looked after the freight business generally. I had something to do with rates. I had a full line of tariffs and quoted rates to local agents. The Missouri, Kansas & Texas Railway Company did not have any through rate from Pilot Grove, Missouri, to Enid, Oklahoma. They had no joint through rate. They did not have any rate that applied to a shipment of cattle from Pilot Grove to Enid, except a combination of local rates is the only way we could make a rate. On shipments moving over our line and then another road, we could make a rate to the junction line, and could then get the rate from there on the other road, and make a rate. We could make a rate on the Katy from Pilot Grove to the Junction point, and then from Junction point to destination on the other road. On a shipment of cattle moving from Pilot Grove to Enid, Oklahoma, Guthrie would be the nearest junction point, I think. If the cattle went by Guthrie the Katy had a rate applicable to that shipment to Guthrie. They had a live stock tariff making rates for Kansas City and St. Louis and they had a distance tariff on interstate business. (Witness is handed a paper and asked to state what it is.) This is a distance tariff on interstate shipments, Missouri, Kansas & Indian Territory, and Missouri and Oklahoma Territory. This is a local distance tariff.

If a shipment of cattle was delivered to the M. K. & T. for shipment to Enid via Guthrie, if this tariff made a lower rate from Pilot Grove to Guthrie than the live stock rate made from St. Louis to Guthrie we would use this tariff. The live stock tariff I refer to is the M. K. & T. live stock tariff. (Witness is handed another paper and asked to state what it is.) This is the M. K. & T. Live Stock Tariff. If Tariff I. C. C. No. 1636, being the local distance tariff, quotes a less rate from Pilot Grove to Guthrie than Tariff I. C. C. No. 2713, then tariff No. 1636 applies. I would have to take the distance table to figure on which takes the lowest rate. The distance is three hundred and eighty miles. The local distance tariff shows a rate of 26½ cents a hundred. The other tariff is 38 cents. So that tariff 1636 would apply. In January, 1907, we did not have any other tariffs that applied to the shipment of cattle from Pilot Grove to Enid, via Guthrie, than these two tariffs. The lowest rate provided by this tariff on stock from Pilot Grove to Guthrie is 26½ cents. Within my knowledge it was the universal custom of the M. K. & T. to require the execution of a written contract, livestock contract, its current form, where the lowest rate was used" (Rec. 156-7).

The Court of Civil Appeals, in passing on this case, found that the shipment consisted of four bulls and nine cows, and that under the terms of the contract the plaintiff in error's liability would be $300.00 (Rec. 207).

On the trial it was agreed that there is no statute in Missouri, like the statute of Texas, prohibiting the limiting of the common law liability by special contract, as in this instance, except there is a statute which prohibits limiting of the time within which suit is to be commenced to less than the statutory period, and that the

common law is in force in Missouri (Rec. 153). A number of decisions were introduced in evidence on the trial of the case as to the construction given by the Missouri Appellate Courts to contracts of the character involved here, the latest expression being from *Mires* v. *Frisco*, 114 S. W. Rep. 1052, from which we extract the following:

> "While it is true the policy of the law forbids a common carrier from contracting for exemption from liability on account of the negligence of it or its servants in transporting property; it is well settled that a contract supported by a sufficient consideration, limiting the common law liability of the carrier to an agreed valuation, will be sustained. The usual consideration in such cases is a reduced rate of freight. It is said to be entirely proper for the carrier and shipper to agree upon such valuation and adjust the amount for which the carrier should respond with reference to the rate charged for carriage" (Rec. 191-2).

The trial court's charge to the jury insofar as material, reads as follows:

> **"Charge of the Trial Court.**
>
> 4. If you believe from the evidence that defendant's employes in charge of the train that was transporting plaintiffs' cattle were guilty of negligence in respect to the management and operation of said train at the time it was derailed; or if you believe from the evidence that defendant's employes were guilty of negligence in failing to use ordinary care in the inspection of said train and its equipment and that such negligence, if any, was the proximate cause of the derailment of said train, then you will find for plaintiffs and assess their damages as

hereinafter instructed unless you should find for defendant under other instructions given you.

5. On the other hand, if you do not believe from the evidence that said employes were guilty of negligence in said respect that proximately contributed to the derailment of said train, or if you believe that the derailment of said train, was the result of an accident, you will find for defendant.

6. (a) The contract of shipment in this case contains among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.

6. (b) Said contract also contains a stipulation to the effect that if the cattle in the shipment are lost or killed, that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you.

10. If you find for plaintiffs, you will find for them in such sum as you believe from the evidence was the fair cash market value of the 13 head of cattle in the City of Enid, Oklahoma, at the time they would have arrived there had not such train been wrecked, together with the cash market value of the said herdmen's outfit" (Rec. 14-16).

Plaintiff in error requested the court to give the following charges; which were refused:

Plaintiff in Error's Requested Charges.

"No. 7 In the contract under which the cattle in question were being carried it is stipulated and agreed that each bull did not exceed in value $30.00,

and that each cow did not exceed in value $20.00, and that in case of any damage or loss thereto plaintiffs should not be entitled to recover more than such stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the Acts of Congress of the United States, and especially by the Act entitled "An Act to amend an Act entitled 'An act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty seven and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by the Act entitled "An Act to Regulate Commerce," approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiffs, in arriving at the amount of your verdict you will not allow for any one bull more than $30.00, nor for any one cow more than $20.00 (Rec. 26-27).

"No. 4. In the contract on which the cattle in question were being carried, it is provided that no suit should be brought by plaintiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding; and you are instructed that the validity of said provision must be determined by the Act of Congress of the United States entitled, "An Act to Amend an Act entitled "An Act to Regulate Commerce," approved February 4th, eighteen hundred and eighty seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906, and by an Act entitled "An Act to Regulate Commerce," and that under said Acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant" (Rec. 24-25).

On February 13, 1909, the trial resulted in a verdict and judgment in favor of defendants in error and against plaintiff in error for the sum of ten thousand six hundred and forty (10,640.00) Dollars, (Rec. 16). Plaintiff in error duly presented its motion for a new trial, which was by the court overruled, (Rec. 17-23), and it gave notice and perfected its appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. On said appeal it presented, among others, the following assignments of error:

Assignment of Errors in the Court of Civil Appeals of Texas.

"The court erred in paragraph 6-b of its main charge to the jury as follows:

'Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under the instructions hereinafter given you' (Rec. 61-62).

"The court erred in refusing to give to the jury special charge No. 7, requested by defendant, as follows:

'In the contract under which the cattle in question were being carried it is stipulated and agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than each stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the Acts of the Congress of the United

States, and especially by the Act entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth eighteen hundred and eighty seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, and by the act entitled "An act to Regulate Commerce" approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiff, in arriving at the amount of your verdict you will not allow for any one bull more than $30.00, nor for any one cow more than $20.00" (Rec. 64).

"The court erred in paragraph 6-a of its main charge to the jury, as follows:

'The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein" (Rec. 61).

"The court erred in refusing to give to the jury special charge No. 4, requested by the defendant, as follows:

'In the contract under which the cattle in question were being carried it is provided that no suit should be brought by plaintiffs against the defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute of limitation to the contrary notwithstanding; and you are instructed that the validity of said provision must be determined by the Act of Congress of the United States entitled "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906, and by an Act entitled "An Act to Regulate Commerce,"

and that under said Acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant" (Rec. 63).

The cause was duly submitted in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas and said court on April 18, 1910, filed its opinion and affirmed the judgment of the District Court. So much of the opinion as deals with the questions now presented is as follows:

Opinion of the Court of Civil Appeals Fifth Supreme Judicial District of Texas.

"Error is assigned to that paragraph of the court's charge reading as follows:

'Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you.'

"The contention is that a contract for the shipment of live stock from Missouri to Oklahoma, entered into in Missouri, which fixes the value of the animals and the amount to be paid in case of loss, is valid and binding. The contract for transportation stipulated that the carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting

from his negligent doing or failure to do any of the things which he hereby contracts to do, or from the negligence of any of his servants. It was stipulated in the contract that the carrier's liability for the loss of each bull was $30.00 and for the loss of each cow it should be $20.00.

"The decisions of this state are to the effect that an agreement in a contract for the transportation of live stock made in this state, which provides that in the event of loss the shipper shall not recover the value of his property lost by the negligence of the carrier, is against public policy and void. *Railway* v. *Maddox*, 75 Tex. 300; *Railway* v. *Ball*, 80 Tex. 606; *Railway* v. *Greathouse*, 82 Tex. 110; *Railway* v. *Anderson*, 63 S. W. 1024; *Railway* v. *Davis*, 31 S. W. 310; *Railway* v. *Montgomery*, 16 S. W. 181; This court held in the case of *Railway* v. *McIntyre*, 82 S. W. 346, that a provision in a contract executed in Spartansburg, South Carolina, for the shiment of freight from that place to Ladonia, Texas, stipulating that in the case of loss the shipper was only to recover $5.00 for each 100 pounds of freight, was against public policy and void, in the absence of a consideration or such limitation. In that case the bill of lading recited that the provision was made in consideration of reduced rate at which the goods were shipped. In the instant case there was in fact no reduction in the rate at which the cattle were to be carried and no consideration for the limitation. We think that the stipulation in the contract of transportation fixing the liabilfty of the carrier at $30.00 for each bull and $20.00 for each cow, unreasonable and void. The testimony showed that the value of the cattle ranged from $40.00 for the lowest to $8,000.00 for the highest per head. The jury found the value of the 13 head of cattle was $10,640.00. According to the valuation as fixed by the contract, the four bulls would be worth $120 and nine head of cows $180.00 making $300.00.

It is clear that the value of the cattle was arbitrarily fixed by the carrier in the contract for transportation with regard to their real value. Again, it is provided by Act of Congress passed June 29, 1906, known as the Hepburn Act. (U. S. Comp. Supp. 1907, p. 909) 'that any common carrier railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' The shipment in this case was from Pilot Grove, in the State of Missouri, to Enid, in the State of Oklahoma, and falls within the terms of this Act, making a carrier liable for loss, damage or injury to property while being transported from a point in one state to a point in another state.

"We understand that appellant does not controvert this construction, but contends that Section 20 of this Act, which embraces the above clause, is unconstitutional. We do not regard it necessary to go into a discussion of the constitutionality of this section of the Act. It was reviewed and held constitutional by the Court of Civil Appeals for the Fourth District, in *Railway* v. *Piper*, 115 S. W. 107, in which a writ of error was refused by the Supreme Court. It was also held constitutional in an able and exhaustive opinion by Judge Rodgers in *Smeltzer* v. *St. L. & S. F. R. R. Co.*, 158 Fed. Rep.

149. See also *Riverside Mills* v. *Railway Co.*, 168 Fed. Rep. 987, and *Railway Co.* v. *Grayson*, 115 S. W. 193. We hold the Act constitutional and that by its terms the limitation under consideration was void.

"It is contended that the court erred in charging the jury as follows: 'The contract of shipment in this case contains, among other things, stipulations that suit for any damage growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.' It is insisted that Congress, having legislated upon the subject, the validity of a contract for an interstate shipment of live stock made in January, 1907, is governed by the Act of Congress and under said Act, and by the common law on questions upon which it is silent, a contract stipulation fixing the time for commencing suit, is valid and binding. This contention is not sustained.

"The Act of Congress regulating interstate commerce, approved February 4, 1887, as amended by the Act of June 29, 1906, is silent as to the time within which suits shall be filed to recover damages from the carrier for its negligence in transporting freight. This stipulation in the contract limited the time within which suit must be brought. It affected the remedy only. The remedy was governed by the law of the forum. *Railway Co.* v. *Hambrick*, 97 S. W. 1072; *Armstrong* v. *Railway Co.*, 92 Tex. 117. By the statute of the State the shipper has two years in which to bring such suit. It is agreed that by statute of the State of Missouri, a common carrier was prohibited from limiting the time within which suits might be filed against it to less than the statutory period. There was no proof introduced to show what the statutory period was. This provision of the contract was plead and relied on by appellant and the burden was on it to show a valid

agreement, and to do this was bound to show that its contract prescribed a valid limitation under the statutes of the State of Missouri. It being agreed that there was a statute in the State of Missouri prohibiting a common carrier from contracting for a shorter period of limitation than that prescribed by the statute and no proof of the statutory period being made, it will be presumed that it is the same as that of the State of Texas. The charge complained of was correct" (Rec. 207-19).

In due time plaintiff in error presented its motion for rehearing in the Court of Civil Appeals and the same, after being considered by the court was, by that court, on May 4, 1910, overruled (Rec. 214-28). Thereafter plaintiff in error made application to the Supreme Court of Texas for a writ of error to review said cause, which petition on June 22, 1910, was denied (Rec. 228). Afterwards, plaintiff in error assigned errors in the Court of Civil Appeals and on July 4, 1910, presented a petition for writ of error to Honorable Edward Douglas White, then a Justice of this court, and in said petition alleged that:

> "In said action, rights, privileges and immunities were claimed by your petitioner under the constitution and statutes of the United States and under the authority exercised under the United States, and the decision of the said Court of Civil Appeals was against the rights, privileges and immunities specially set up and claimed under said constitution, statutes and authority" (Rec. 229).

Which petition was granted and the cause brought to this court for review (Rec. 229-30).

Statutes Involved.

The act to Regulate Commerce approved February 4, 1887, was amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, and in force at the time when the transaction in this case occurred.

Section 2 reads:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similiar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful."

Section 3 in part provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 6 in part provides:

"That every common carrier subject to the provisions of this Act shall file with the commission created by this Act and print and keep open to public

inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this Act."

* * * * * * *

"No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid,

which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed charges shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Provided, that the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

* * * * * * *

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff * * *."

Section 10 in part provides:

"Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation,

who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

Section 20 in part provides:

"That any common carrier, railroad, or transportation company receiving property for transpor-

tation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Section one of the Act of February 19, 1903, c. 708, 32 Stat. 847, entitled, "An Act to further regulate commerce with foreign nations and among the States," commonly known as the Elkins Act, as amended by section two of the Act of June 29, 1906, c. 3591, 34 Stat. 584, provides that:

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction, etc., * * * and it shall be unlawful for any person, persons or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce, and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs, published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby

any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction, etc. * * *."

"* * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

Errors Assigned and Relied on in Petition For Writ of Error From the Supreme Court of the United States.

I.

"The Court of Civil Appeals erred in holding that under the provisions of Section 20, of the Act of Congress of June 29, 1906, known as the Hepburn Act, the stipulation in the contract for the transportation of live stock made in January, 1907, out of which this suit arises, fixing the value of the live stock in case of loss, or damage in shipment, is invalid"(Rec. 233).

II.

"The Court of Civil Appeals erred in overruling and not sustaining the following assignment of error:

'The trial court erred in paragraph 6-b of its main charge to the jury as follows:

'Said contract also contains a stipulation to the effect that if cattle in the shipment are lost or killed that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you' " (Rec. 233).

III.

"The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error:

'The trial court erred in refusing to give to the jury special charge No 7, requested by plaintiff in error, as follows:

"In the contract, under which the cattle in question were being carried, it is stipulated and agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than such stipulated valuation, and you are instructed that the validity of this provision of the contract is governed by the acts of Congress of the United States, and especially by the Act entitled 'An Act to Amend an Act' entitled, 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29th, 1906, and by the act entitled 'An Act to Regulate Commerce,' approved February 4th, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiffs in arriving at the amount of your verdict you will not allow for any bull more than $30.00, nor for any cow more than $20.00" (Rec. 235-36).

IV.

"The Court of Civil Appeals erred in holding that where a contract is made in the State of Missouri for a shipment of live stock into Oklahoma in January, 1907, and the contract contains a stipulation that suit for any damages growing out of the contract must be commenced within ninety (90) days, and where suit is commenced in the State of Texas for damages growing out of such contract more that ninety (90) days after the same arose that such stipulation is governed by the laws of Texas, and is therefore invalid, instead of holding that same is governed by the Act of Congress and valid, by which holding plaintiff in error was denied the rights secured to it by its contract made under said Act of Congress" (Rec. 234).

V.

"Congress by the provisions of the Act of June 29, 1906, known as the Hepburn Act, having regulated the transportation of interstate commerce, and having placed no restriction on the making of the contracts providing a time within which suit growing out of the transportation of the same may be brought, the Court of Civil Appeals erred in holding that where a contract is made in the State of Missouri for a shipment of live stock into Oklahoma in January, 1907, and the contract contains a stipulation that suit for any damages growing out of the contract must be commenced within ninety (90) days, and where suit is commenced in the State of Texas for damages growing out of such contract more than ninety (90) days after the same arose that such stipulation is not valid" (Rec. 234).

VI.

"The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error: The trial court erred in paragraph 6-a

of its main charge to the jury, which is as follows:

'The contract of shipment in this case contains, among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein' " (Rec. 234).

VII.

"The Court of Civil Appeals erred in overruling and in not sustaining the following assignment of error:

'The trial court erred in refusing to give to the jury special charge No. 4, requested by plaintiff in error, as follows:

'In the contract under which the cattle in question were being carried, it is provided that no suit should be brought by plaintiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute of limitation to the contrary notwithstanding, and you are instructed that the validity of said provision must be determined by the act of Congress of the United States, entitled 'An Act to Amend an Act,' entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29th, 1906, and by an act entitled, 'An Act to Regulate Commerce,' approved February 4th, 1887, and that under said acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant' " (Rec. 235).

VIII.

"The Court of Civil Appeals erred in not reversing and reducing the judgment rendered in this cause by the trial court for the plaintiff in error" (Rec. 236).

BRIEF OF ARGUMENT.

I.

The Court Has Jurisdiction.

Defendants in error shipped over the railway of plaintiff in error 13 head of cattle, four bulls and nine cows, from Pilot Grove, in the State of Missouri, to Guthrie in Oklahoma Territory. At the time of the shipment plaintiff in error had duly published and had on file with the Interstate Commerce Commission two rates for the shipment of cattle between said points; one a lower rate, at owner's risk, with limited liability, the other twenty per cent higher, with ordinary carrier's liability. Defendants in error made a written contract with plaintiff in error for the shipment of the cattle, and paid the lower rate. The contract provided: (a) An agreed valuation of not exceeding $30.00 for each bull, and not exceeding $20.00 for each cow, in case of loss, and that plaintiff in error should not be liable in excess of said sum; (b) that in case loss occurred suit should be barred, unless brought within ninety days after the loss occurred. After the cattle started on their journey, and while they were yet in the State of Missouri, the car, in which they were being transported by plaintiff in error, left the track, rolled into a river, and the cattle were lost and destroyed. Defendants in error brought suit in Texas more than ninety days after the loss occurred, for damages for such loss. Plaintiff in

error insisted in answer thereto that it was in no event liable for more than the amount of the contract valuation of the cattle, and that the suit under the terms of the contract was barred; that in the shipment of the cattle it was engaged in interstate commerce; that Congress, in an Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof, had undertaken to regulate interstate commerce, and in so doing had placed no restriction on contracts for agreed valuations of articles shipped, in case of loss, nor contracts limiting the time within which suits could be brought for the loss of articles shipped; that the same were provided for in its tariff published and filed in pursuance of said acts; that by reason thereof such contracts were valid and protected under said acts; and such provisions of the contract were valid under the laws of Missouri, where the contract was made, and where the loss occurred.

These contentions were denied by the trial court and by the Court of Civil Appeals.

A construction of the Act to Regulate Commerce and Acts amendatory thereof, which would lead to a judgment in its favor, was asked by plaintiff in error, in the State Court. The claim was fully set up. It was denied by the highest State Court available to plaintiff in error. The questions thus raised are subject to review by this court.

St. Louis, I. M & S. Ry. Co. v. *Taylor*, 210 U. S. 281.
Robinson v. *B. & O. R. R. Co.*, 222 U. S. 508.
Nutt v. *Knutt*, 200 U. S. 12.
M. K. & T. Ry. Co. v. *Elliott*, 184 U. S. 530.

II.

Under the act to regulate commerce a carrier may fix its rates with reference to its liability, or the time within which suit shall be brought, in case of loss or damage, increasing the rates where the liability is that fixed by common law or the time for filing it is long and reducing them where the liability is limited or the time within which to sue is short.

This proposition needs but little elaboration. The scheme of rate making prescribed by Congress in the Act to Regulate Commerce contemplates that the carriers shall, in the first instance, fix the rates, rules and regulations by which the charges that they may demand and collect are to be determined. Such rates, rules and regulations are specified in the tariffs issued, filed with the Interstate Commerce Commission, and published as required by law, and the carrier is the judge of what they shall be. Congress perhaps might have prescribed a different scheme, but it did not do so. It left the carriers free to make the rates, rules and regulations, subject to review in the method provided for determining their justness and reasonableness.

No one will question that this is true so far as the rates are concerned. The same paragraph (the first paragraph of Section 6), which requires the specification of the rates, fares and charges in the tariffs also provides that the tariffs shall contain "any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

It requires no argument to show that regulations such as are mentioned in this proposition affect or determine, to some extent, both the charges to be collected and the value of the service to the shipper.

Where tariffs duly issued, filed and published contain two rates for the shipment of cattle, one based upon the carrier's common law liability with the statutory period for filing suit and the other based upon a limited liability with a time less than that prescribed by the statute for suing, such provisions are binding upon the carrier and the shipper and must be observed by them both in the collection and payment of charges and in the adjustment of loss and damage claims.

This court has stated the general purpose of the act to regulate commerce in many cases.

In *Kansas City Southern Railway Company* v. *C. H. Albers Commission Company*, 223 U. S. 573, Mr. Justice VanDevanter, delivering the opinion said:

> "The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed."

In *Armour Packing Company* v. *United States*, 209 U. S. 56, Mr. Justice Day, delivering the opinion, said (page 72):

"The views of this court, speaking through Mr. Justice White, in *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 391, are apposite here:

" 'It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer.'

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* above quoted from, the court inquired what was the purpose of the Act to Regulate Commerce, and in a sentence answered: "It was to compel the carrier, as a public agent, to give equal treatment to all."

The purpose of the statute would clearly be defeated if carriers were permitted to depart from the rates, rules and regulations, prescribed in their tariffs, as this court has several times most emphatically said:

In *Texas & Pacific Railway Company* v. *Mugg,* 202 U. S. 242, the agent of the carrier quoted the shipper a less rate than that provided in the tariff. At destination the delivering line demanded the tariff rate, which the shipper paid under protest, and afterwards sued to recover the difference between the rate quoted and the rate collected. It was held that he could not recover.

The case of *Kansas City Southern Railway Company* v. *C. H. Albers Commission Company, supra,* is to the same effect. After discussing the matter the court said:

"We conclude, as matter of law, that the special agreement (for a less—than tariff rate) was void; that the established local rates were unaffected by it; that the rate collected by the garnishee (the tariff rate) was the applicable legal rate, and that the finding and judgment should have been in favor of and not against, the garnishee."

In *Louisville & Nashville Railroad Company* v.

Motley, 219 U. S. 467, it was held that a contract whereby a man was given free transportation during the remainder of his natural life in consideration for the settlement of a personal injury claim, could not be enforced after the Hepburn Act took effect, for the reason that Congress, "upon grounds of public policy and for the protection of third parties has made certain requirements with regard to equality of rates, which, in their practical application, would be rendered nugatory" by enforcing the contract involved and others similar to it. In the course of the opinion the court said:

> "It is now an established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute."

In the case of *Chicago & Alton Railroad Company* v. *Kirby*, 225 U. S. ....., decided May 27, 1912, a contract to give a special service not provided for in the carrier's tariff was held invalid. In disposing of the question the court, speaking through Mr. Justice Lurton, said:

> "The broad purpose of the commerce act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed

> out in *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391, 50 L. Ed. 515, 521, 26 Sup. Ct. Rep. 272, and in *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, as to need no reiteration."

These authorities leave no doubt about the proposition that a carrier's rules and regulations fixing or affecting the amount of the charges which it may demand or the value of the service rendered, when embodied in its duly issued, filed and published tariffs, become, in effect, rules and regulations imposed by law, and have the same binding force upon the shipper and carrier as if they had been enacted by Congress itself. So important did Congress regard this matter that in Section 1 of the Elkins Act it specifically declared:

> "That the wilful failure upon the part of any carrier to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law shall be a misdemeanor."

The only question for consideration under them is whether rules and regulations fixing liability in case of loss or damages affect the value of the service to the shipper. That they do seems clear, and, if so, such rules and regulations, when embodied in a tariff, are just as binding upon both the carrier and the shipper as are the rules and regulations affecting the rates.

The courts, whether state or federal, have no power to declare unreasonable the rates, rules or regulations specified by a carrier in its tariffs unless the matter shall

first have been presented to the Interstate Commerce Commission. In other words, the machinery prescribed for ascertaining the reasonableness or unreasonableness of such rates, rules and regulations requires that the jurisdiction of the Interstate Commerce Commission be first invoked and its order made with reference thereto.

The leading case in support of this proposition is *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, in which the contention was made that the courts might declare a rate unreasonable and award damages for applying it. In disposing of the contention the court said:

> "Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the

power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

This case is followed in *Robinson* v. *Baltimore & Ohio Railroad Company*, 222 U. S. 506, wherein it was sought to have the court declare unjustly discriminatory a regulation of the carrier which imposed 50c per ton more for handling coal loaded into the cars from wagons than when loaded from tipples. This court, speaking through Mr. Justice VanDevanter, said:

"The act, c. 104, 24 Stat. 379; c 382, 25 Stat. 855; c. 61, 28 Stat. 643; c. 708, 32 Stat. 847, whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to

receive complaints against rates so established, and to inquire and find whether they were in anywise violative of the prohibitions of the act, and if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation, by an action in the Circuit Court of the United States, if the carrier failed to comply with it.

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any non-conformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

"When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obliga-

> tory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure."

The court then quotes from the Abilene Cotton Oil Company case, the paragraph above set out and continues:

> "It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper.
>
> "Of course, the provision in Section 22, as also the provision in Section 9, must be read in connection with other parts of the act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, federal or state, in the absence of an appropriate finding and order of the Commission. *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co., supra,* pp. 442, 446."

Another case declaring the same principle is *Baltimore & Ohio Railroad Company* v. *United States, ex rel., Pitcairn Coal Company,* 215 U. S. 480, in which it

was said that regulations which are primarily within the jurisdiction of the Interstate Commerce Commission are not subject to judicial supervision, review or enforcement until the commission has been properly afforded an opportunity to exert its administrative forces. The purpose of the suit, among other things, was by mandamus to compel the railroad company to make a certain distribution of its cars. It was held that the court was without jurisdiction, and the petition was ordered dismissed.

See also *Interstate Commerce Commission* v. *Illinois Central Railway Company*, 215 U. S. 452, and *Interstate Commerce Commission* v. *C. R. I. & P. Ry. Co.*, 218 U. S. 88.

A consideration of the foregoing propositions leads inevitably to this conclusion that

Where a carrier specifies two rates on cattle in its tariffs, one based upon its common law liability and the other upon a limited liability fixed by the terms and conditions of its current live stock contract, such live stock contract, when properly executed, is valid, and the carrier's liability must be determined by its provisions.

The execution of this contract was necessary for defendants in error to obtain the rate upon which their cattle moved. The tariff expressly provided that the rate given them would apply "only on shipments made at owner's risk with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract provided by this company, the contract to be first duly executed

in manner and form provided therein" (Rec. 154). In the face of this provision it would have been unlawful for plaintiff in error to have given defendants in error the benefit of the rate obtained without the execution of the contract.

Since, then, defendants in error had to execute the contract in order to get the lower rate, the contract provisions must be binding upon them or we have this anomally; that a paper limiting the liability of the carrier must be executed in order to get the benefit of a rate but the carrier's liability in case of loss or damage is the same as if the paper had not been executed.

If the question were whether the shipper should be charged a different rate than that specified in the tariff or whether the rates should be based upon an estimated weight which would affect the amount thereof, the contention would scarcely be made that the tariff provisions should not control. That question, however, from a legal standpoint, would not be different from the one now presented. To depart from the tariff provisions or from the provisions of the contract based thereon in this matter would as necessarily result in a discrimination and in a disregard of the lawful schedules as to depart from the rates or other regulations contained in the tariff.

If, at the time defendants in error shipped their cattle, another shipper had shipped a similar number and kind of cattle from and to the same points and this other shipper had declined to agree to the clauses limiting the carrier's liability and the time within which suit should

be brought and had elected to pay the higher rate, and both shipments had been lost, clearly a discrimination would have resulted had the same measure of liability been applied to both.

Plaintiff in error had two rates for the shipment of cattle. Its tariff did not carry the rate defendants in error had the benefit of with its common carrier liability unlimited. To hold that defendants in error can get the benefit of the lower rate and yet recover upon the basis of an unlimited liability unquestionably is a departure from the tariffs. It in effect compels plaintiff in error to do that which the law says it shall not do and that for which it is subject to a penalty for doing.

The following from *Chicago & Alton Railroad Company* v. *Kirby*, above cited, is appropriate in this connection:

> "The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.
>
> "For such a special service and higher respon-

sibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

"The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence (Italics ours).

"An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage, in that it is not one open to all others in the same situation."

If it is lawful to charge a higher rate for a special service when provision therefor is made in the tariffs and unlawful to give the special service when the tariffs contain no provision covering it, it is also unlawful to transport cattle at a reduced rate without at the same time limiting the liability of the carrier in accordance with the regulations under which the reduced rate is given.

This must be true or the rates based upon limited liability are absolutely unlawful.

III.

The Court of Civil Appeals, in disposing of this case, held that the Carmack Amendment prohibits contracts of the kind here involved, which is in effect to say that, because of this amendment, a carrier may not lawfully fix two rates for the movement of cattle, basing

one upon its common law liability and the other upon a limited liability.

The Carmack Amendment reads:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

We assert that

There is nothing in the Carmack Amendment forbidding the basing of rates upon limited liability or prohibiting contracts limiting liability in consideration of reduced rates.

In *Gibbon* v. *Poynton*, 4 Burrows, 2298, Lord Mansfield said:

> "His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionable to the risque. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and, therefore, he ought, in reason and justice, to have a greater reward."

At common law, while the right of the carrier to inquire as to the value of a package in order to determine his freight was always recognized, it was held in the absence of such inquiry, that the shipper was under no obligation to disclose the value. But as early as 11 G. 4, and 1 W. 4, c. 68, it was provided by statute in England that a carrier should not be liable beyond ten pounds unless at the time of making the shipment, the shipper, if the goods were of greater value, should so declare to the carrier, and pay accordingly.

Prior to the statute of 11 G. 4, and 1 W. 4, c. 68, it had been the general custom in England for carriers to give notice by advertisement and posters that they would not be responsible for goods of greater value than five pounds, and in some cases ten pounds, unless the value was declared at the time of shipping, and the rate paid accordingly, and it was uniformly held by the courts that a carrier who had given such notice would not be liable at all, even for the five pounds or the ten pounds, to a shipper who shipped a package of greater value, as an ordinary package, without disclosing its real value.

Gibbon v. *Poynton*, 4 Burr. 2298 (1769).
Clay v. *Willan*, 1 H. Bl. 298 (1789).
Izett v. *Mountain*, 4 East 371 (1803).
Batson v. *Donovan*, 4 B. & Ald. 21 (1820).

Under the statute 11 G. 4, and 1 W. 4, c. 68, which required the shipper to give notice of the value if the value exceeded ten pounds, it was held that the carrier is not liable, even if the loss happens by the gross negligence of his servants, where a parcel of greater value

than ten pounds is delivered without declaring its value and paying the rate according to value.

Hinton v. *Dibbin*, 2 Ad. & E. N. S. 646.

Long prior to the passage of this amendment this court, in the case of *Hart* v. *Pennsylvania Railroad Company*, 112 U. S. 331, held that a contract fairly made, agreeing on the valuation of the property carried with the freight rate based on an assumption by the carrier of liability only to the extent of the agreed valuation, even where the loss resulted from the negligence of the carrier would be upheld. The court said it was just and reasonable to uphold such contracts, and it would be unjust and unreasonable "if a shipper should be allowed to reap the benefit of the contract if there is no loss and to repudiate it in case of loss."

The rule of the Hart case has been followed by the federal courts in many cases, among them:

Kidd v. *Greenwich Ins. Co.*, 35 Fed. 351.
Calderon v. *Atlas S. S. Co.*, 64 Fed. 874.
Calderon v. *Atlas S. S. Co.*, 69 Fed. 574.
The Kensington, 88 Fed. 331.
Jennings v. *Smith*, 106 Fed. 139.
Saunders v. *Southern Ry.*, 128 Fed. 15.
Macfarlane v. *Adams Express Co.*, 137 Fed. 982.
Missouri, etc., Ry. of Texas v. *Patrick*, 144 Fed. 632.
Taylor v. *Weir*, 162 Fed. 585.
Blackwell v. *Southern Pac. Co.*, 184 Fed. 489.
Pierce Co. v. *Wells Fargo Co.*, 189 Fed. 561.

This court approved the rule in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442; *Calderon* v. *Atlas*

S. S. Co., 170 U. S. 272; *The Kensington*, 183 U. S 263, and *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477.

In the Calderon case the bill of lading was held invalid because it undertook to exempt the carrier from any liability for packages over the value of $100.00 each. In the Kensington case the limitation was held invalid because the alternative offered to the passenger of a higher valuation for a higher freight was that he should ship his baggage under a bill of lading. This would have brought it within the Harter Act, which relieves the carrier from liability for errors of navigation or mismanagement.

Without citing the numerous cases in state courts which follow the Hart case, we note that the States of Minnesota, Wisconsin and Ohio, which were cited in the opinion in the Hart case (p. 342) as supporting a contrary rule, now expressly adopt the rule, as appears from the following cases decided since the Hart case by the courts of last resort in those states:

Alair v. *Railroad Company*, 53 Minn. 160.
Douglas Co. v. *Railway Co.*, 62 Minn. 288.
O'Malley v. *Railway Co.*, 86 Minn. 380.
Loeser v. *Chicago M. & St. P. Ry. Co.*, 94 Wis. 571.
Ullman v. *Chicago, etc., Ry. Co.*, 112 Wis. 150.
Baltimore & Ohio Ry. Co. v. *Hubbard*, 72 Ohio St. 302.

Congress is presumed to have known of these holdings, and had there been any intention on its part to prohibit such contracts or to condemn this method of rate-making, which was very common, it would have used ap-

propriate language to express its intention. There is nothing in the language used or in the purpose of the amendment requiring the construction given it by the Court of Civil Appeals.

The main purpose of the Carmack Amendment was to give the holder of the bill of lading a right of action against the initial carrier for loss caused by connecting carriers, but it also creates a cause of action against the initial line which is in the nature of a right created by Federal law to take the place of rights prior thereto existing under the common law or under state enactments.

The general purpose of the amendment was discussed by this court in *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, in which the court, after discussing mentioning the evil which brought about the legislation, said (page 203):

> "The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility."

In *Southern Pacific Railway Company* v. *Crenshaw*, 63 S. E. 865, the Court of Appeals of Georgia said:

> "Indeed, we have no doubt that at the time when the provision declaring the liability of the

initial carrier in interstate shipments was inserted in the act it was within the legislative mind that it would be expedient to prescribe a uniform rule on the subject binding on state and federal courts alike. Until Congress spoke the states were free to give to such transactions varying liabilities. The courts of some states recognized the rule in the Muschamp case (8 M. & W. 421), others did not. Some states allowed carriers to exempt themselves from all or a part of the common law liability by rule, regulation, or contract, others did not. The federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state or for a carrier whose lines were extensive to know without considerable investigation and trouble, and even then oftentimes with but little certainty what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the state court's obeying and enforcing the provisions of the federal statute where applicable to the facts in such cases as shall come before them. It may be said in passing that the liability imposed against the initial carrier does not (according to the express terms of the act) prevent the owner of the goods from proceeding *ex delicto* against the last or connecting carrier for loss or damage to the goods where such carrier would be liable under existing laws."

The amendment has been frequently construed by state courts and by inferior Federal courts as not prohibiting agreements of the kind in question.

In *Greenwald* v. *Weir*, 199 N. Y. 170, it is said:

> "What the statute forbids is the making of a contract, receipt, rule or regulation exempting a carrier from the liability imposed by the statute. There is but one liability which can properly be said to be imposed by the statute, and that is the liability of the initial carrier for a loss occurring on the line of a connecting carrier. That is a new liability created and imposed by the statute. The liability of a carrier for a loss upon its own line is not new and is not created or imposed by the statute, but existed before the statute was passed. The statute is completely satisfied, therefore, by construing it as creating and imposing on the initial carrier a new liability, and forbidding him from exempting himself, by stipulation or agreement from that new liability. What the statute forbids is the use of any device whereby the carrier undertakes to 'exempt' himself from the newly imposed liability. The use of the word 'exempt' is appropriate if it was the intention of the Congress to prevent a carrier from relieving himself altogether from liability for a loss occurring on the line of a connecting carrier, but wholly inappropriate if intended to prevent an agreement between the carrier and the shipper as to the value of the goods to be shipped. Both the federal courts and the courts of this state have uniformly distinguished between shipping contracts wherein the carrier has undertaken to exempt himself from liability at all, and those in which he has agreed with the shipper as to the amount which should be taken as the value of the goods. Contracts of the first kind have been generally condemned, and contracts of the second kind sustained."

To the same effect are the following cases:

Bernard v. *Adams Express Co.*, 205 Mass. 254.
Travis v. *Wells-Fargo*, 79 N. J. L. 83.
P. C. C. & St. L. Ry. Co. v. *Mitchell* (Ind.), 91 N. E. 735.
Larsen v. *Oregon S. L. R. Co.* (Utah), 110 Pac. 983.
Frye v. *Southern P. Ry. Co.*, 247 Ill. 564.
Fielder v. *Express Co.* (W. Va.), 71 S. E. 99.

Decisions under the Harter Act (27 Stat., 445) are persuasive in this connection. That act provides:

> "That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of any kind and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect, etc."

In *Caldron* v. *Atlas S. S. Co.*, 64 Fed. 874, it was held on the authority of *Hart* v. *Railroad Co.*, 112 U. S., 331, that a clause in an ocean bill of lading which provided "the carrier shall not be liable * * * for goods of any description which are above the value of $100.00 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." was not in violation of the Harter Act. In

the Court of Appeals this judgment was affirmed (*Calderson* v. *Atlas Steamship Co.*, 69 Fed. 574), on the ground that the stipulation was a reasonable and valid limitation on the carrier's liability. In this court (*Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272), Mr. Justice Brown, delivering the opinion, approved the Hart case as applicable to an ocean bill of lading governed by the Harter Act, but held the principle inapplicable only because the true meaning of the exemption clause was to relieve the carrier from all liability for packages worth more than $100.00.

Many states having statutory provisions restricting the right of common carriers to limit their liability by contract, nevertheless apply the rule of the Hart case.

A Michigan statute provides that: "No such company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by agreement to be signed by both parties thereto" (Complied Stat., 1897, Sec. 6239). But it is held by the Supreme Court of Michigan in *D'Arcy* v. *Adams Express Company*, 162 Mich. 363:

> "Where the consignor of goods by express fails to place a value on the shipment, as called on to do by the bill of lading filled out by him, the alternative provision thereof limiting the value to $50.00 will prevent any further recovery.

A Minnesota Statute (Revised L. 1905, Sec. 2008), provides:

> "The liability of common carriers at common law with reference to property in their custody shall

> not be limited by contract or otherwise, except as stated in their published classification schedules. Such liability must include absolute responsibility for the acts of their agents in reference to such property."

But the rule of the Hart case is given full effect by the courts of that state; *Alair* v. *Railroad Company*, 53 Minn. 160; *Douglas Company* v. *Railway Company*, 62 Minn. 288.

Illinois and South Carolina have similar statutes but both follow the rule of the Hart case; *Oppenheimer* v. *United States Express Co.*, 69 Ill. 62 (cited in the Hart case); *Johnstone* v. *Richmond & D. R. Co.*, 39 S. C. 55.

While it is indicated by opinions of the courts of other states that a contrary construction of similar statutory provisions has been adopted, we submit that such construction is not sound and should not be applied to the federal statute here involved.

The federal liability imposed on the initial carrier, as regards the amount of the liability and irrespective of the fact that liability is imposed on it for the loss on the line of the connecting carrier, is the common law liability formerly imposed on carriers by state law; and the proviso against contracts exempting carriers from such liability is no stricter than the common law rule recognized in the Hart case, that a contract exempting from liability for negligence is invalid. This is the effect of the construction placed on the act by the Supreme Courts of Massachusetts and New Jersey and the Court of Appeals of New York. To construe the section as invali-

dating an agreement fairly entered into, fixing the value of the goods for the purposes of transportation, with a rate based on such value, would attribute to Congress an intention to abrogate a rule well established in the federal courts and many of the state courts, and substitute as a uniform rule governing interstate shipments one which Mr. Justice Blatchford characterized as "unjust and unreasonable, and repugnant to the soundest principles of fair dealing and of the freedom of contracting" (112 U. S. at 341).

So to construe the section would also be to attribute to Congress an intention to strike down a contract or regulation whereby the interstate carrier undertook to confine his liability to the value accepted by him from the shipper as the true value for the purpose of fixing the rate, according to his tariffs filed under Section Six of the Act to regulate commerce. Such construction would also invite the shipper to understate value for the purpose of getting a low rate, and lead to other abuses which the whole statute was designed to remedy. The purpose of the provision insofar as it deals with the amount of liability at all, is fully effectuated if it be construed as an enactment of the common law rule invalidating contracts whereby the carrier attempts to relieve itself from the results of its own negligence, and such unreasonable agreements and regulations as were condemned in *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272, and the Kensington, 183 U. S. 263.

Unless this construction is sound and parties have the right to agree on the value of articles shipped before

shipment, then it would follow that they could not agree on the value of the goods after shipment and loss, and it would be beyond the power of the parties to make settlements of such losses after they occurred and lead to the conclusion that nothing short of a final judgment in a court of competent jurisdiction can fix the amount of loss in an interstate shipment.

IV.

The Court of Civil Appeals further based its holding that the contract was void upon the ground that it is against the public policy of Texas. We say that

No law or public policy of a state can serve to set aside or change the rates, rules and regulations of a carrier affecting interstate commerce specified in its duly issued, filed and published tariffs.

These are two reasons why this is true:

In the first place, the Act to Regulate Commerce and the rates, rules and regulations of a carrier made pursuant thereto must be considered in determining the public policy of the state just as much as the laws passed by the legislature of the state or the decisions of its courts of last resort.

In a case arising under the Federal Employer's Liability Act the Supreme Court of Errors of the State of Connecticut suggested that the courts of the state were without jurisdiction because the provisions of the law were contrary to the state's public policy. This court, however, held that the suggestion was unsound.

In discussing the matter Mr. Justice VanDevanter, speaking for the court, in *Mondou* v. *New York, New Haven & Hartford Railroad Company*, 223 U. S. 1, said:

> "The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When congress, in the exertion of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

In the next place

Congress has rightfully assumed jurisdiction of the subject matter, and therefore state laws covering the same, must yield.

At this date it is superfluous to cite authorities in support of the propositions, that the power of Congress to regulate interstate commerce is supreme, and that in the field of such commerce where state regulations may be made under the police power in the absence of action by congress, state laws must yield when congress takes possession of the field.

On the last proposition, there need not be directly "inhibitive congressional legislation." It is sufficient, as was said by this court in *Southern Railway Co.* v. *Ried & Bean*, 222 U. S. 444, if congressional legislation occupies the field of regulation. When it does so this excludes action by the states.

A case well in point is *Northern Pacific Railway Co. v. State of Washington*, 222 U. S. 370, involving the validity of an Hours of Service Law passed by the State of Washington. The Federal Hours of Service Act was approved March 4, 1907, but did not take effect until March 4, 1908, and it was the contention of the state that, although the state law would be inoperative after March 4, 1908, it should be given effect between the passage of the Federal Law and that date. This contention, however, was not sustained. The court, speaking through Mr. Chief Justice White, said:

> "But we are of opinion that this view is not compatible with the paramount authority of congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because congress choose to make its prohibitions take effect only after a year, the matter with which congress dealt remained subject to state power, is to cause the act of congress to destroy itself; that is, to give effect to the will of congress as embodied in the postponing provision for the purpose of overriding and render-

ing ineffective the expression of the will of congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute."

We submit that congress has taken possession of the field of interstate rate making and rules and regulations concerning interstate charges and certain loss and damage claims incident to or growing out of interstate shipments, and thereby has rendered ineffective state laws covering the same subject matter.

In *Southern Railway Company* v. *Reid*, 222 U. S. 424, Mr. Justice McKenna, speaking for the court, said (page 438):

> "It is evident, therefore, that congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared, unreasonableness in the rates and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight and in facilities furnished."

Again, on page 440, he said:

> "There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

Accordingly, it was held that a statute of North Carolina which imposed a penalty for a failure to receive

property for shipment under certain conditions was void. In *G. C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98, a Texas statute imposing a penalty for demanding a higher rate than that specified in the bills of lading was held void when applied to an interstate shipment. The statute, the court said, being in conflict with the Federal law, must yield to it.

If congress has so taken possession of the field of interstate commerce as to make invalid a state law imposing a penalty for a failure to receive property for transportation under stated conditions or imposing a penalty for a failure to deliver property upon payment of the charges specified in the bill of lading, it has, we submit, for the same reason, so taken possession of the field as to render inoperative state laws governing liability where the liability is a matter of contract based upon tariff provisions, in consideration of which the shipper was given a reduced rate.

The court of civil appeals, it is true, finds that "in the instant case there was in fact no reduction in the rate at which the cattle were to be carried and no consideration for the limitation." But that finding is directly in the face of the uncontradicted testimony, which shows that plaintiff in error did have two rates for the shipment of cattle and that defendants in error obtained the benefit of the lower rate, which benefit they could obtain only by executing the contract limiting plaintiff in error's liability (Rec. 154, 155-6, 156-7). Under these circumstances the finding of the state court is not binding upon this court, but it will look to the whole testimony to de-

termine for itself what the fact is. *K. C. So. Ry. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573.

Thus far we have considered the matter without reference to the Carmack Amendment. That Amendment adds additional force to the suggestion that Congress has taken possession of the field.

As above stated, the Carmack Amendment creates a cause of action against the initial carrier, first, for damages caused by it, and, second, for damages caused by connecting lines. As to those matters (and the damages here involved fall within the first class) the Act must be considered exclusive, just as the Federal Employer's Liability Act is held exclusive in the field which it occupies. The fact that the cause of action so created takes the place of rights of action formerly based on state law is of no consequence. That was true of the field occupied by the Federal Employer's Liability Act, but the court nevertheless held it exclusive.

This conclusion would unquestionably be accepted but for the proviso to this amendment reading as follows:

> "Provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws."

But this proviso cannot be so construed as to leave in existence rights of action under state law which apply to the same subject matter. "To admit * * * that the matter with which congress dealt remained subject to state power is to cause the act of congress to destroy

itself," as was said in *Northern Pacific Railroad Co.* v. *State of Washington, supra.* The proviso must be limited to saving rights of action under the state law outside, and not within the field which congress has occupied.

To so construe the amendment as to leave state regulations in force concurrently with the regulations of congress would permit discrimination and leave uncertainty in a field where congress clearly intended there should be no discrimination and no uncertainty. For instance, the law of Missouri sustains contracts thus limiting liability (*Myers* v. *St. L. & S. F. R. R. Co.*, 114 S. W. 1052; *Townsend & Wyatt Dry Goods Co.* v. *United States Express*, 113 S. W. 1161; *Kellerman* v. *Railroad Company*, 34 S. W. 41). So does the law of many other states. The law of still other states condemns them. Thus the liability of a carrier handling an interstate shipment in a field covered by the Act of Congress, if the state laws may still control, will depend not upon the federal law nor upon the tariff rules and regulations lawfully made to govern such matter, but upon the election of the shipper as to where he will sue and what law he will invoke.

It may be insisted that *C. M. Etc. Ry. Co.* v. *Solan*, 169 U. S. 133, and *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, are in conflict with the views here expressed. An examination of them, however, will show that there is not necessarily a conflict.

The facts in the Solan case distinguish it from the case at bar, but, aside from that, there is nothing indicating that in deciding it the court considered the ques-

tion we are seeking to present in this case. Nor was this question discussed by the court in the Hughes case. The decision of the Hughes case turned upon the validity of a contract, and not upon the inviolability of tariff rules and regulations.

Again, since those cases were decided, the Federal Government has tightened its grip, so to speak, upon interstate commerce. It has occupied a larger field, and the court might well say in the Hughes case, "there is no sanction of agreements of this character limiting liability to stipulated valuations, and until Congress shall legislate upon it is there any valid objection to the state enforcing its own regulations upon the subject although it may to this extent indirectly affect interstate commerce contracts of carriers?" and yet hold in the present case that Congress has so taken possession of the field as to render invalid state regulations.

When the Hughes case was decided, Section 1 of the Act to Regulate Commerce in part, read:

> "The term 'transportation' shall include all instrumentalities of shipment or carriage."

It now reads (speaking as of the date when this shipment moved):

> "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage,

and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and rates applicable thereto."

A portion of Section 6 of the Act then read:

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately terminal charges and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares and charges."

The corresponding portion now reads:

"The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force and shall also state separately all terminal charges, storage charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act."

The Elkins Act and the Carmack Amendment have both been passed since that case was decided.

We repeat, Congress has taken possession of the field and state regulations must therefore yield.

V.

Defendants in error, in declaring the value of their cattle at less than their true value for the purpose of securing a lower rate than they would have been charged had the true value been declared, were guilty of an unlawful act, under the Act to Regulate Commerce and the Elkins Act, and they cannot maintain a suit based upon such transaction.

In the contract of shipment defendants in error expressly represented and agreed that the cattle did not exceed in value the amounts named in the contract (Record, 152). The Elkins Act provides that:

> "It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to Regulate Commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said Act to Regulate Commerce and the acts amendatory thereto or whereby any other advantage is given or discrimination is practiced."

Having declared the value of their cattle to be less than their true value and by this means having obtained the benefit of a rate which, but for such declaration they could not have obtained, defendants in error, we submit, violated this provision of the law, for thereby some advantage was given or discrimination practiced.

Armour Packing Co. v. *U. S.*, 209 U. S. 56.

A transaction which constitutes a violation of these acts cannot be the basis of an action.

Ellison v. *Adams Express Co.*, 245 Ill. 410.

The rule is firmly established in this court that a transaction in violation of a penal statute cannot be the basis of judicial action, unless the statute manifests an intention not to limit its scope to the exaction of the penalty.

Miller v. *Ammon*, 145 U. S. 421.
Brown v. *Tarkington*, 3 Wall. 377.
Hanauer v. *Doane*, 12 Wall. 342.
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McMullin v. *Hoffman*, 174 U. S. 639.
Harriman v. *Northern Securities Co.*, 197 U. S. 244.

VI.

In Conclusion.

The contract of shipment in this case was made pursuant to rates and regulations made under the Act to Regulate Commerce. The state court denied the validity of those regulations and rendered judgment without reference to them. Their validity was insisted on by plaintiff in error at every stage of the proceedings, and it now insists that in no event could defendants in error have recovered more than $400.00; and that as the suit was not brought within ninety days, as provided for in the tariffs and contract, the defendants in error are not entitled to recover at all.

To permit the setting aside of the tariff regulations, as the Court of Civil Appeals has done, and to authorize a recovery by defendants in error of the full value of their cattle in the face of the contract provisions is to compel plaintiff in error to depart from its tariff provisions in violation of law and to give defendants in error an advantage not open to the public. To sustain the judgment of the Court of Civil Appeals will defeat the very purpose of the Act to Regulate Commerce.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

ROBERT L. HARRIMAN and ALBERT C. HARRIMAN, Composing a Firm and Copartnership of HARRIMAN BROTHERS,
Defendants in Error.

No. 121.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

ADDITIONAL STATEMENT.

Albert C. Harriman, one of the defendants in error, stated (T. R., p. 72): "Before the shipment of the cattle from Pilot Grove, I negotiated with the agent of the defendant there for a rate for the cattle to Enid, Okla. We undertook to get as low a rate as possible from Pilot Grove to Enid, Okla., and find out which

road to ship on. While negotiating with the agent for a low rate, I could not say that we disclosed to the agent that these were show cattle, or not. * * * I did not apprise him of the great value of these cattle."

This witness further testified (T. R., p. 176), "In the contract which I made with the Railroad Company, defendant, pertaining to the shipment of these cattle, I think the value placed upon these cattle in that contract reads as follows: The four bulls were valued at $30 each, total $120 for the bulls, and the nine cows were valued in that contract at $20 each, making a total of $180. I signed that contract."

The brother, R. L. Harriman, testified (T. R., p. 100): "I did not load the cattle. Our firm shipped them. My partner, Bert Harriman (Albert C. Harriman), and our herdsman, Mr. Minton, loaded them. I was not there at the time."

Hunter, the station agent, testified (T. R., p. 155) that he "quoted the rate to Bert Harriman. I got the rate under which the cattle were shipped from the general freight agent. I gave it to Mr. Harriman. * * * I got the rate of 36½ cents from the general freight agent, that rate being made up of 26½ cents from Enid to Guthrie, and 10 cents beyond. The amount of freight paid by Harriman Bros. for that shipment was $80.30. That amount was based on this rate of 26½ cents to Guthrie and 10 cents beyond. That is the rate which we use a live stock contract for. * * * That is the lowest rate provided by this tariff. The rate of 26½ cents was the rate provided in cases where the regular form of live stock contract was issued. The minimum weight is in the tariff. The minimum weight used on this shipment was 22,000 lbs. That is what

we charged for. * * * Ordinarily thirteen head of cattle would not weigh over the minimum weight."

Twenty-two thousand pounds, the minimum weight provided for the car under the tariff, at 36½ cents per hundred, is $80.30, the amount paid by the plaintiff, and, endorsed across the face of the contract (T. R., p. 153), are the words "Paid 80.30." This testimony, therefore, conclusively shows that the plaintiffs knew there were different rates, and that they wanted the lowest rate. The tariff covering this rate was duly filed with the Interstate Commerce Commission (T. R., p. 154) and this tariff made this special live stock contract a part of the rate, and the rate was only applicable where that form of contract was executed.

Attorneys for defendant in error concede that the tariff in question, fixing two different rates for different contracts, was duly filed and published. The point is made, however, that the forms of contracts were not filed with the Interstate Commerce Commission. This was entirely unnecessary, the tariffs themselves showing the rules, limitations and regulations which were to be found in the forms of contract. Rule 3 of the tariff in question expressly provides that the rate on which the cattle moved would apply only on shipments made "at owner's risk" with "limitation of liability on the part of the Railway Company as common carrier, under the terms and conditions of the current live stock contract provided by the company, the contract to be first duly executed in the manner and form provided therein". This same rule 3 provided that the shipper should have the option of shipping at the carrier's risk "without limitation of the carrier's liability at common law". The contracts are, therefore, specifically referred to and made a part of the tariffs.

The testimony of L. G. Hunter, local railroad agent at Pilot Grove, quoted from at page 8 of brief for defendant in error, shows conclusively that the special contract made in this case was the current live stock contract provided by the company, and referred to in rule 3 of the tariff.

In the case of United States v. Miller, 32 Sup. Ct. Rep. 323, being a criminal prosecution, it was held that, in an indictment for violation of the Interstate Commerce Act, it was not necessary to allege that the schedules and tariffs were posted in the manner required by law; that the essential thing is the making and publication of the rate, and that publication consists in promulgating and distributing the tariffs in printed form; that publication is a step in establishing a rate, while posting is a continuing duty, and that when the rate is made and published, it becomes and remains effective although tariffs are not posted in local stations, and although once posted should afterwards be removed, purposely, or otherwise.

In the case of Meeker v. Lehigh Valley R. R., 162 Fed. Rep. 359, the Circuit Court for the Second District of New York held that "It is presumed in the absence of averments to the contrary that every common carrier engaged in interstate commerce has complied with the law by establishing rates and printing, filing, publishing and posting them". Citing Tex. & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426.

This tariff shows that, by the payment of twenty per cent more, or something less than $20, the plaintiff in error would have accepted the shipment of cattle under an unlimited liability contract. It can hardly be contended, in view of the fact that the defendants in error claimed that this car of cattle was worth $15,000

and actually recovered over $10,000, that the increased rate for unlimited liability contract was unreasonable, or was meant to be prohibitive and to coerce shippers into using the limited liability contract. However, there is no room for the contention that the defendants in error were coerced or were required to accept this rate. They sought the lower rate and the limited liability contract, and the record shows that the shipper never disclosed to the Railway Company the great value of their cattle. On the contrary, they concealed the nature and value of the animals under circumstances which called for a disclosure of their value, and, under all the authorities, they are concluded by the valuation stated and agreed to in the bill of lading. The estoppel may be just as effective as if there had been an affirmative misrepresentation. Hart v. Railroad, 112 U. S. 331. The special live stock contract (T. R., p. 150), by bold notice at the top thereof, expressly stated that the company had two rates on live stock; that the special form of contract was used at the rate named below "at owner's risk on conditions herein set forth, with the distinct understanding that said rate is a special rate which is hereby agreed to, accepted and understood to be at less than the published tariff rate applying thereon, when transported at carrier's risk", and that the shippers, at their option, could have shipped the live stock at the carrier's risk by paying the higher rate applicable under such circumstances. The defendants in error signed this contract and are concluded by all the statements and agreements therein contained, and, in the body of the contract, paragraph 8, "said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value these prices, and, in case of any

loss or damage thereto by carrier's negligent transportation or the handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitled to recover only actual damages and, in no instance, more than the stipulated valuation shown above. This shipment was a very fancy and aristocratic lot of animals. It was destined to Enid partially for show purposes and partially for sale. It consisted of a herd bull, "Golden Crown", valued all the way from $8,000 to $3,000; a show herd, consisting of a young bull and four heifers; six other animals not so valuable, for sale, and a "nurse cow". Some of the fancy stock were sired by "Golden Fame, out of Imported Enchantress, by Prince of Fashion". Others were from the "Mary family"; still others from the "Butterfly family", and some from the "Scotch Crookshank family", which is said to be a "fashionable and desirable family".

This live stock contract, by its terms, does not purport to be, and is neither a "limited liability contract" nor a contract providing for exemption from liability. It concedes liability for negligence. It is termed a special contract based on specific rates and values and recites that live stock are not carried under that form of contract at the rates named where the carrier's "liability in case of any loss or injury shall exceed the following prices per head", etc. In case of loss, the shipper can recover full value, up to the maximum agreed valuations.

II.

State Decisions.

The overwhelming weight of authority so far as the decisions of the state courts are concerned uphold agreed or maximum value clauses, both at the common-law and under the Carmack amendment (Original Brief of Plaintiff in Error, p. 58).

For convenience we quote from some of them.

The Supreme Court of Massachusetts in Bernard v. Adams Express Co., 91 N. E. Rep. 327, held that such a contract is not "an exemption from liability. * * * It is a contract as to what the property is in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject-matter of the contract so far as the parties care to define it for the purpose of showing of what value that is which comes into the carrier's possession, and for which the carrier must account in the performance of his duty as a common carrier. It is not in any sense a contract exempting him from liability."

The use of the phrase "limited liability contracts" is in a sense an unhappy one, because the word "liability" when so used, while susceptible of a double meaning, never has meant as applied to "agreed valuation" or "maximum valuation" clauses that it limits the causes for which the carrier is liable, nor limits the amount of care required of the carrier, but only liquidates the damages or fixes the maximum amount of recovery in case of loss from whatever cause.

In McElvain v. St. Louis & San Francisco Railroad Co., 131 S. W. 745, the Missouri Springfield Court of

Appeals held that an agreed valuation clause was valid under the Carmack Amendment. It is a well-reasoned case. Among other things, the Court said:

> "Another contention of the respondent is that the contract as to the limitation of its liability is invalid because it was an interstate shipment, and that the federal law—the Carmack Amendment to the Hepburn Act—it is void whether or not it is supported by a consideration. The complaint here is a common-law action. No federal question is presented by the pleadings. The shipment was an interstate one. The Interstate Commerce Act is a part of the law of the State of Missouri, and enforceable in its courts when rights under it or given by it arise as incidents of a trial. Pittsburg C. C. & St. L. Ry. Co. v. Mitchell (Ind.), 91 N. E. 735. An interstate common carrier is free to exercise all its rights under the common law to the full extent, unless such exercise has been made unlawful by the Interstate Commerce Act. Union Pac. Ry. v. Updike Grain Co., 178 Fed. 223, 101 C. C. A. 583. The Interstate Commerce Act (Act February 4, 1887, c. 104, Sec. 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), amended June 29, 1906 (Act June 29, 1906, c. 3591, Sec. 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906, Supp. 1909, p. 1166]), reads as follows:
>
> " 'That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over

whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property as may be evidenced by any receipt, judgment or transcript thereof.'

"This statute, as is apparent, changes the common-law rule as applied in many states respecting the non-liability of the first carrier for loss occurring on the line of connecting carriers, in interstate shipments. 'It has been heretofore held at common law, and frequently stipulated by express provisions of shipping contracts, that the liability of each carrier is confined to losses occurring on his own line. This rule in cases of interstate carriage has now been abrogated, and hereafter the initial carrier remains liable to the shipper for losses occurring on the lines of connecting carriers, as well as on his own, having a right of recovery over against the connecting carrier if the loss has occurred on the line of the latter. The defendant's contention is that this is the whole extent to which the statute has abrogated or changed the existing rule. The plaintiffs insist that the statute goes further. The words upon which plaintiffs rely are that any common carrier "shall be liable to the

lawful holder thereof for any loss, damage or injury to such property (the merchandise shipped) caused by it * * * and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed'" (Greenwald v. Weir, 130 App. Div. 699, 115 N. Y. Supp., *loc. cit.* 314). It will be seen by the terms of this statute—the Carmack Amendment to the Hepburn Act—that it forbids the making of a contract, receipt, or regulation exempting the carrier from the liability imposed by the statute. There is but one liability which can properly be imposed by the statute, and that is the liability of the initial carrier for a loss occurring on the line of a connecting carrier. This is a new liability, created and imposed by the statute. The liability of the carrier for losses occurring on its own line is not new. It is not created or imposed by this statute, but existed before the statute was passed. The statute is completely satisfied, therefore, by construing it as creating and imposing on the initial carrier a new liability, and forbidding an exemption by stipulation or agreement from that new liability, which, as we have stated, is the liability of the initial carrier for losses occurring on the line of a connecting carrier. The use of the word 'exempt', as applied here, is to prevent a carrier from relieving himself altogether from liability for a loss occurring on the line of a connecting carrier, but the use of the word 'exempt' is 'wholly inappropriate if intended to provide an agreement between the carrier and the shipper as to the value of the goods to be shipped.'"

In Fielder & Turley v. Adams Express Co., 71 S. E. 99, the Supreme Court of Appeals of West Virginia up-

held an agreed valuation or limited liability express receipt or shipping contract under the Carmack Amendment. The Court said:

"That portion of section 20 to which we have referred deals with the question of liability, not the measure or extent thereof. At least that is its primary or main purpose. It does not deal expressly with the limitation of liability. It says the common carrier shall be liable for the loss, damage, or injury to the property, but does not fix any measure or standard of compensation. Of course it destroys the effect of all receipts, contracts, rules, and regulations purporting to wholly exempt interstate common carriers. Its exact terms are that the carrier shall be liable for loss, damage, or injury, and no contract, receipt, rule, or regulation shall exempt it. When this act was passed, the right of common carriers to limit their liability in the manner in which this one has done so had been declared by the Federal Supreme Court and many others. Congress is deemed to have had knowledge of this, and having such knowledge, it placed no express provision in the act abolishing the right or inhibiting the practice. The purpose of this clause of the statute was to make the initial carrier liable for loss, damage, or injury to goods entrusted to it for interstate transportation, whether occasioned by negligence or not, on its own line or elsewhere, notwithstanding any contract, receipt, rule or regulation purporting or attempting to relieve from liability therefor. It does not deal with the extent of liability.

"The limitation clause in one of its aspects is necessary to the protection of common carriers. In an action for loss, damage, or injury, when no agreement has been made respecting the value of the property, the carrier is at a great disadvantage

in respect to the evidence of value. The shipper occupies a superior ground. Carriers have just and reasonable ground for requiring a specification of value, setting a limit beyond which no damages can be claimed, as a measure of protection against exorbitant and unjust demands. On the other hand, a shipper seeking or obtaining a valuation below the actual value of the property for the purpose of obtaining a low rate is guilty of an act of misrepresentation. Hence there is no hardship nor injustice in holding him bound by his representation or agreement as to the value. This contract of limitation therefore rests upon good solid reason and just considerations. The abolition thereof would have introduced a very great change in the methods of transportation for purposes extending far beyond any indicated by the express terms of the act. It does not fall clearly within the inhibition of discrimination. At any rate, the express prohibition thereof is not adopted as a means of preventing discrimination, nor does it fall clearly within the purpose respecting exemption from liability. Therefore we think the act does not abrogate the rule permitting limitation of liability. While the Interstate Commerce Commission disclaims power to determine this question, it being a judicial one, it expresses the opinion that the act has not altered the rule. *In re* Released Rates, 13 Interst. Com. Com'n R. 550."

The case of Travis v. Wells-Fargo Co., 74 Atl. Rep. 444, is to the same effect, but puts a more limited and, as we think, the proper construction upon the Carmack amendment, the Supreme Court of New Jersey holding that the Carmack amendment was only intended to give a cause of action against the initial line for the entire transportation, and that the only prohibitions

contained in the statute were against, in any way, exempting or limiting its liability in that respect. The Court said:

> "There was no intention to impose upon the receiving carrier any additional liability for goods lost by it, and that the loss, under the statute is the loss of goods of such value as the carrier has bargained to carry and, under the contract, is to be paid for carriage. It was not intended to abrogate the right to limit liabilities for loss, in accordance with the amount paid for carriage, which right was vindicated by our Board of Errors in the case of Atkinson v. Transfer Co., 71 Atl. 278."

This Court followed the views of the New York court in the case of Greenwald v. Weir, 199 N. Y. 170, cited and quoted from in our brief.

II.

The Decisions of This Court Under the Harter Act Are Controlling and Decisive.

Under that act any provision in a bill of lading or shipping document by which the ship owner "shall be relieved from liability" for loss or damage, is declared to be void, but under this statute this Court has held that agreed valuation clauses are good.

In the Calderon case, 170 U. S. 272, the shipping contract in question was held invalid because it was construed as being an attempt to relieve the ship owner from any and all responsibility. The contract there in question provided that the carrier should not be liable for "gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any

description which are above the value of $100 per package", etc. The trial court and the Court of Appeals construed this contract as not providing for a total exemption from liability, but as limiting its liability as to any one package to $100, but this Court construed the contract as stated, to be an attempt to absolutely exempt the carrier from any liability at all, for negligence or otherwise, or for any amount, and, for that reason, reversed the case, still adhering to its rulings in the Hart case and other cases, upholding agreed valuations, or the fixing of maximum liabilities.

In Pierce v. Wells, Fargo & Co., 189 Fed. Rep. 561, the United States Circuit Court of Appeals for the Second Circuit upheld an agreed valuation bill of lading, both under the terms of the Interstate Commerce Act and under the decisions generally, basing its opinion largely upon the decision of this Court in the Hart case, and holding that there was nothing in the decisions of this Court in the Calderon and Kensington cases to the contrary. As to these cases the Court said:

> "The plaintiff in error relies upon Calderon v. Atlas Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, and The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190. They are not applicable. In the Calderon case the bill of lading, as construed by the Supreme Court, exempted the carrier from any liability for packages over the value of $100 each. Mr. Justice Brown recognized the right of the carrier to limit his liability:
>
> "'Acting upon this view, it was held that the liability of the respondent was limited to $100 per package, following in this particular the rulings of this court in Railroad Company v. Fraloff, 100 U. S. 24, 27 (25 L. Ed. 531), and Hart v. Pennsyl-

vania Railroad, 112 U. S. 331 (5 Sup. Ct. 151, 28 L. Ed. 717), and the principle announced in Magnin v. Dinsmore, 56 N. Y. 168, s. c. 62 N. Y. 35 (20 Am. Rep. 442); s. c. 70 N. Y. 410 (26 Am. Rep. 608); Wescott v. Fargo, 61 N. Y. 542 (19 Am. Rep. 300), and Graves v. Lake Shore & Mich. Southern Railroad, 137 Mass. 33 (50 Am. Rep. 282). In this last case the rule obtaining in this court is adopted to its full extent by the Supreme Judicial Court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. See also Ballou v. Earle, 17 R. I. 441 (22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. Rep. 881); Richmond & Danville Railroad v. Payne, 86 Va. 481 (10 S. E. 749, 6 L. R. A. 849); J. J. Douglas Company v. Minnesota Transportation Co., 62 Minn. 288 (64 N. W. 899, 30 L. R. A. 860).'

"But he went on to say that the contract properly construed relieved the carrier of any liability whatever, which was, of course, void:

"'In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in

value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. If the language had been ambiguous, we might have given it the construction contended for, which probably conforms more nearly to the clause ordinarily inserted in such cases, but such language is too clear to admit of a doubt of the real meaning.'

"In the Kensington case the limitation was held invalid because the alternative offered to the passenger of a higher valuation for a higher freight was that she should ship her baggage under a bill of lading.

"This would have brought it within the Harter Act (Act Feb. 3, 1893, c. 105, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), which relieves the carrier from any liability for errors of navigation or management by its servants and so was unfair. The words with which Mr. Justice White concluded his opinion show that the Court did not intend to depart from its ruling in the Hart case, *supra*:

" 'In view of the nature and duration of the voyage, of the circumstances which may be reasonably deemed to environ trans-atlantic cabin passengers, and the objects and purposes which it may also be justly assumed the persons who undertake such a voyage have in view, we think the arbitrary limitation of 250 francs to each passenger, unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment, was void. It is therefore unnecessary to decide whether the ticket delivered and received, under circumstances disclosed by the record, gave rise to a contract embracing the exception to the carrier's liability, which were stated on the ticket. We intimate no opinion on the subject.'

"(3) It is also suggested that the fixing of a value lower than the real value is in violation of section 10 of the Interstate Commerce Act of February 4, 1887 (Chapter 104, 24 Stat. 382), as amended (Act March 2, 1889, c. 382, Sec. 2, 25 Stat. 857 [U. S. Comp. St. 1901, p. 3160], but, being the same for all shippers, there can hardly be said to be any discrimination."

To the same effect is the case of Hohl v. Norddeutscher Lloyd, 175 Fed. Rep. 544.

III.

The Act to Regulate Commerce and the Decisions of the Interstate Commerce Commission.

Section 1 of the Interstate Commerce Act, among other things, provides:

"And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of this act, which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the

provisions of this act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries."

And the last two paragraphs of section 20 of the act provide:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability herein imposed. Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

It is made the duty of common carriers to "establish, preserve and enforce just and reasonable regulations and practices affecting * * * the issuance, form

and substance of bills of lading * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transporting and delivery of property upon just and reasonable terms." (Sec. 1 of Act to Regulate Commerce, as amended June 18, 1910). And by the provisions of section 15 it is made the duty of the Commission to investigate any regulations or practices whatsoever of such carrier or carriers which are alleged to be unjust or unreasonable, or otherwise in violation of the act; and by section 15 the Commission is authorized and empowered to determine and prescribe what regulations and practices are fair and reasonable, and to make orders that the carriers shall cease and desist from such violations to the extent which the Commission finds the same to exist. Under section 1 it was therefore clearly the duty and the right of the plaintiff in error in establishing its tariffs upon live stock to include therein rules and regulations with respect to the terms upon which live stock would be carried thereon, and these rules and regulations are as much a part of the tariff as the rates themselves. If the defendant in error conceived the rate in question, including the rules and regulations, to be unreasonable and unjust, he should have proceeded before the Interstate Commerce Commission by way of reparation claim or otherwise, in the first instance, and not in a state court of the State of Texas. Upon this question the case of J. C. Shaffer & Co. v. Chicago, Rock Island & Pacific Ry., 21 I. C. C. Rep. 8, and the decision of this Court in the "Abilene case" are conclusive. In the Shaffer case there was a provision in the uniform bill of lading that "the amount of any loss or damage for which any carrier is liable should

be computed on the basis of the value of the property, being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid, at the place and time of shipment, unless a lower value had been represented in writing by the shipper, or agreed upon or determined by the classification or tariffs upon which the rate was based, in which event such lower value should be the maximum amount governing such computation, whether or not such loss or damage occurred from negligence."

In this proceeding the complainant alleged that this provision in the uniform bill of lading was unjust and unreasonable, and prevented the defendant from paying to the complainant just compensation for the loss of a carload of wheat. The Commission held that it had jurisdiction of the claim and that the provisions in question were not in violation of the Interstate Commerce Act and not in violation of the Carmack Amendment, although it held that the contract complained of admittedly changed the common-law rule which makes the carrier liable for the value of the property at the place of destination. It held the contract in no way attempted to exempt the carrier from liability; that it was merely a contract between the parties "fixing the time, place and manner of arriving at the value of the property, and was reasonable and just" under the terms of the Interstate Commerce Act, and not contrary to the letter or spirit of the Carmack Amendment.

To the same effect is the case of Miller & Lux v. Southern Pacific, 20 I. C. C. Rep. 129, where a reduced rate and live stock contract was involved.

To the same effect are the ruling and opinion of the Interstate Commerce Commission In the Matter of

Bills of Lading, 14 I. C. C. Rep. 346. The uniform bill of lading approved in this proceeding was the bill of lading used in the Shaffer case, and it is important to note that in the uniform bill of lading made and approved by the Interstate Commerce Commission itself is a provision providing for "agreed valuations", and at page 349 the Commission states:

> **"It is not intended to take the place of special bills of lading which are issued on particular commodities of such a nature, or so handled, as to require exceptional provisions, such as live stock."**

The live stock contract in question, in this particular, is not different from the provisions contained in the uniform bill of lading. The uniform bill of lading prescribed by the Interstate Commerce Commission specifically contemplates that carriers should, in their tariffs, provide for agreed valuation clauses.

Section 2 of the uniform bill of lading prescribed by the Interstate Commerce Commission reads as follows:

> "Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.
>
> "No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed."

And section 6 as follows:

"No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon."

In the Matter of Released Rates, 13 I. C. C. Rep. 550, the Interstate Commerce Commission expressly upheld the making of rates and tariffs based upon agreed valuations. Household goods, they say, for example, "differ widely in value, and it is fair to all that the man who ships goods of a low value should receive the benefit of a lower rate than the man who ships more expensive goods. Rate making upon this principle is in every respect legitimate. * * *" They further state: "But it is obvious that a carrier may lawfully establish a scale of charges applicable to a specific commodity, and graduated reasonably, according to value." They further state that "a shipper should be allowed his choice of rates, which leaves the carrier's liability unlimited, as at common law, or lower rates, based upon such a limited liability as the law sanctions." In this proceeding it was further held that the rules and regulations with respect to the nature of the contract or bill of lading to be executed under a specific rate should be published and made a part of the tariff.

Commenting upon the Carmack Amendment, they state losses "caused by the carrier" and losses due to causes "beyond the carrier's control" must be separately considered. This is manifest because the Carmack Amendment does not undertake to make any carrier absolutely liable, but only liable for injuries "caused by it", or by some connecting carrier, the

Commission observing that "while, in the absence of express stipulations, the liability of a common carrier is practically that of an insurer, and not limited to losses occasioned by its negligence, or other companies' conduct"; that, at common law, a carrier was never liable for losses occasioned by acts of God, or the public enemy, and always had the right to relieve itself at common law from this "complete responsibility", by special agreement, and strip itself of its insurer's liability and remain responsible only for negligence or other misconduct, citing York Mfg. Co. v. Railroad Co., 3 Wall. 107; New York Central v. Lockwood, 17 Wall. 357. This, undoubtedly, is a correct statement of the law, and the Commission added: "A careful study of the provisions of the Hepburn Act (the Carmack Amendment) will show that the carrier's right in this respect has not been abrogated."

IV.

The Opinion of the Texas Court of Civil Appeals.

In the brief of defendants in error seemingly great reliance is placed upon the opinion of the Court of Civil Appeals for the Fifth District of Texas, deciding this case. The opinion is quoted in full in our original brief. It will be noted that it neither decides nor considers any of the real issues now presented to this Court. The Texas Court of Civil Appeals simply upheld the Carmack Amendment as being constitutional, and refused to consider the points relied upon by the plaintiff in error throughout the trial. Even though the act *in toto* was constitutional, the provisions in the live stock contract relied upon by plaintiff in error as a defense were valid under that act and should have

been upheld. These questions were brushed aside, and the provisions of the contract relied upon were simply held invalid, because against the public policy of the State of Texas and contrary to the local decisions in that state. (See motion for rehearing, T. R., p. 214.)

It will be observed from the record in this case that the defendants in error were citizens and residents of the State of Missouri. The plaintiff in error is a corporation organized under the laws of the State of Kansas, and only owned and operated lines of railroad in the States of Missouri, Kansas and Oklahoma. The live stock contract in question was executed in Missouri, and covered the transportation of a carload of live stock from Pilot Grove, in the State of Missouri, through the States of Missouri, Kansas and Oklahoma, to Enid, Oklahoma. The wreck in which the animals were killed occurred in the State of Missouri. Notwithstanding all of these facts, and notwithstanding the fact that suit could have been brought in the courts of the State of Missouri, in the county of the residence of defendants in error, for reasons best known to them they went to Texas and filed this suit? Why? The answer is simple. They were not willing to have their case decided according to the law and the decisions of the place where the contract was made and where the injuries were sustained. Nor were they willing to have the case decided in any state through which the lines of railway of plaintiff in error extend. They left Missouri, passed through the States of Kansas and Oklahoma, and filed their suit in Texas, for the sole purpose of avoiding, if possible, the decisions of this Court (if the case had been instituted in Missouri and then removed) and the decisions of the courts of Missouri upon kindred questions, and taking advantage of the "public

policy" of the State of Texas, which; under the decisions, is contrary to general public policy, as announced by this Court, and contrary to the public policy of the State of Missouri. Not only did the defendants in error reside in Missouri, but all of the witnesses having any knowledge of the controversy were residents of the State of Missouri. But the exigencies of the case required a trial in the State of Texas. Under the law of Missouri and the decisions of the courts of Missouri the agreed valuation clause was valid. It was valid under the decisions of this Court. And even applying the decisions of this Court in the Solan Case and the Hughes Case, which were rendered before the passage of the Carmack Amendment, and which decisions simply held that until Congress legislated upon the subject the states were free to pass such laws and the local courts were free to adopt their own public policy or to construe the common law as they saw fit, with respect to the validity of such contracts, so far as damages sustained in the particular state were concerned, even though growing out of interstate shipments, yet the decision of the Court of Civil Appeals of Texas cannot be sustained. It was the duty of the Court of Civil Appeals of Texas in this case to have enforced the Missouri law and the Missouri decisions, as the contract in question was made there and the damages sustained happened there. But we respectfully submit that when Congress legislated upon the subject of the liability of carriers, as it has done, that the whole question is withdrawn from state legislation, and all decisions of the state courts must give way to the decisions of this Court as to the proper construction of the Carmack Amendment and kindred questions. This Court has repeatedly held that as to what is the com-

mon law, with respect to the duty of a common carrier, is not a question of local decision, and that this Court is not concluded by state decisions thereon.

We further respectfully submit that it was the purpose of Congress in passing the Carmack Amendment to occupy the field, and to exclude state legislation and supersede state decisions which were contrary to the decisions of this Court on the questions here involved. It was a notorious fact that, upon the questions here involved, there were conflicting opinions. This Court and the federal courts and most of the state courts were in harmony, while there were a number of other state decisions directly in conflict therewith. Evidently it was the purpose of Congress to cure this condition and to have but one law and one rule of decision upon these questions, and that the act of Congress and the decisions of this Court should be paramount and of universal application in all the states. It was not the purpose of this act, as suggested in the Latta Case (172 Fed. Rep. 856), relied upon by defendants in error, to permit plaintiffs in case of injuries to pick out the state where they were most likely to secure a verdict, and have it sustained under the decisions of the local courts, and thus make "confusion worse confounded." The *proviso* to the Carmack Amendment means, and can only mean, that notwithstanding the act makes the initial carrier liable for the acts and defaults of connecting lines, yet the plaintiff may, if he sees fit, sue either the delivering line or any intermediate line, and that he might do so either in a federal court or a state court, at his election; but if he elects to sue either the delivering line or an intermediate line in the state court, still the rule of decision in such court must be the Carmack Amendment itself, as construed by this

Court, and not the pre-existing state laws as construed by the local state courts. If any other rule is to be enforced than the one here suggested, it will mean that while there is but one tariff rate applicable on a shipment moving through a dozen states, yet that this tariff and the rules and regulations prescribed thereunder may have as many different meanings and as many different interpretations as there are states. In one state, under the particular rate and the rules and regulations, plaintiff may only recover $40.00, and in another state $3,000.00. This would certainly be an anomalous condition.

The case of Savage v. Jones, 225 U. S. 501, cited and relied upon by defendant in error, is not in point. The decisions of this Court in quarantine and inspection cases are clearly distinguishable from its decisions involving state legislation directly bearing upon interstate commerce where Congress has occupied the field, and this distinction is pointed out in the opinion in this case. Here the state legislation was supplemental and in no way in conflict with the federal legislation, it being held that the object of the Federal Food and Drug Act was simply to prevent adulteration and misbranding, and that Congress, by that act, did not require the manufacturer to disclose the ingredients of the article, save in specific instances. This Court has repeatedly held that with respect to rates, safety appliances, hours of service and liability for negligence the acts of Congress supersede and override all state legislation upon those subjects.

In the case of Missouri Pacific Ry. Co. v. Castle, 32 Sup. Ct. Rep. 606, it was held that while the states may legislate upon the question of the liability of the master to a servant as applied to railroads engaged in in-

terstate commerce, that after the passage of the Federal Liability Act such act superseded all state legislation upon the subject. The Carmack Amendment, covering the question of liability under bills of lading therefore supersedes all state legislation and state decisions upon the same subject.

V.

The Decisions of This Court.

The **Hart Case** was decided in 1884 and, in that case, there was a shipment of fine horses from a point in New Jersey to St. Louis, Mo., the horses ranging in value from $15,000 to $3,000 each. The contract provided that the carrier assumed liability only to the extent of the agreed valuation of not "exceeding $200 each." The case was tried in the United States District Court for the Eastern District of Missouri. The contract was upheld and, among other decisions cited by the Supreme Court of the United States in support thereof, was the case of Harvey v. Terre Haute Ry., 74 Mo. 538. In that case it did not appear that there were two rates upon horses of different value, but the Court held it must be presumed from the bill of lading and without any evidence on the subject, especially in the absence of any evidence to the contrary, that as the rate of freight expressed is stated to be on the condition that the defendant assumes liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation, adding that this was especially so as the contract was, by its heading, denominated "A Limited Liability Live Stock Contract." It was held that all the negotiations between the parties

were merged in the bill of lading, and that the valuation was an agreed valuation. The Court further said:

> "The presumption is, conclusively, that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered to the defendant, it was because it is a rate measured by the valuation expressed."

While in a good many state courts it has been held that in order to support a special live stock contract or other contract limiting the liability of carriers as existing at common law there must be a specific consideration therefor, the weight of authority is to the contrary, as this Court held in the Hart case. That doctrine has since been firmly established by this Court.

In Cau v. Texas & Pacific Ry., 194 U. S. 431, the provision of a bill of lading relieving the carrier from liability by fire, even though resulting from negligence, was upheld, although there was no specific consideration in the way of reduced rate therefor, this Court very properly observing that, whatever the rate was, it was fixed and based upon the exemption from liability, and that the consideration could be given in one rate as well as in two different rates.

This doctrine has been carried to the extent that a carrier, in a special passenger contract, may relieve itself of all liability for negligence, or otherwise, where no rate is paid at all.

Nor. Pac. R. R. v. Adams, 192 U. S. 440;
Baltimore & Ohio R. R. v. Voight, 176 U. S. 498.

In the case of Railroad Co. v. Fraloff, 100 U. S. 24, this Court said:

> "It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person."

In the case of Galveston, Harrisburg & San Antonio Ry. v. Wallace, 32 Sup. Ct. Rep. 205, the ruling of this Court in the Riverside Mills case, 219 U. S. 186, was reaffirmed, but the decision in the G. H. & S. A. case leaves for future decision the question of whether

or not, under the Carmack Amendment, the initial carrier is liable, except in cases of negligence, or whether or not, under the Carmack Amendment, special contracts may not be lawfully made. In this case the Court holds that the construction placed upon the Carmack Amendment in the Riverside Mills case is, that wherever a carrier voluntarily accepts goods for shipment to a point on another line in another state, "It is conclusively treated as having made a through contract. It thereby elected to treat connecting carriers as its agents for all purposes of transportation and delivery."

In the case of C. & A. Ry. v. Kirby, 32 Sup. Ct. Rep. 646, this Court held void a special contract made by the C. & A. for the shipment of a carload of high-grade horses which were moving from Springfield, Ill., to New York City. The contract, however, only covered the transportation from Springfield, Ill., to Joliet, Ill. Kirby was engaged in the developing of high-grade horses and desired to send this carload to be sold at a public sale at Madison Square Garden. Several routes were available, but the published rates via all the routes were the same. It was desirable, however, to send them by the route which would insure their arrival in the shortest time after delivery to the carrier, and the C. & A. agreed to carry them from Springfield to Joliet, so as to deliver them at Joliet to a connecting carrier, to be carried by fast stock train over that line, known as the "Horse Special." The C. & A. failed to get the horses to Joliet in time to move on this horse special. It was held that the contract was void and non-enforcible, because no provision for the making of such special contracts was made in the

published tariffs of the C. & A. R. R., and to enforce the contract would work a discrimination.

In the case of Chicago, Milwaukee & St. Paul Ry. Co. v. Solan, 169 U. S. 133, decided in 1898, it was held that "a statute of the state providing that no contract shall exempt any railroad corporation from the liability of a common carrier which would have existed if no contract had been made, did not, as applied to a claim for an injury happening within the state under a contract for interstate transportation, contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce." The action was brought in the court of Iowa, against a railroad corporation incorporated under the laws of Wisconsin and authorized to transact business in Iowa, and having a railroad extending from Rock Valley, in Iowa, to Chicago, to recover $10,000 damages for injuries suffered by the plaintiff, in Iowa, from the derailing by defendant's own negligence of a caboose attached to a freight train in which plaintiff was traveling under a written contract by which the railroad company agreed to carry him with his cattle from Rock Valley, in Iowa, to Chicago, Ill. The special contract provided that in case of injuries the company should not be liable for an amount exceeding $500. It was claimed that the contract was based on a rate less than a rate applicable where there was no such special contract, and that under the common law the contract was valid, and that the Iowa statute was void, as an attempt to regulate and limit contracts relating to interstate commerce. The trial court excluded an offer made by the defendant to show that it had two rates, and that, if the special contract had not been made, another rate, which was 50 per cent higher,

would have been charged, and also instructed the jury that the contract was void because in violation of the Iowa statute. The jury returned a verdict for the plaintiff in the sum of $1,000. The case was taken to the Supreme Court of Iowa and affirmed.

This Court held that, in the absence of any statute, any contract by which a common carrier undertakes to exempt himself from "all responsibility" for loss or damage arising from the negligence of himself or his servants is void, as against public policy, and as attempting to put off the essential duties resting upon a public carrier, and as tending to defeat the fundamental principle upon which the law of common carriers was established, the securing of the utmost care and diligence in the performance of their duties to the public; citing the case of Railroad Co. v. Lockwood, 17 Wall. 357, where a drover traveling with cattle, in consideration of having his cattle carried at a less rate stipulated "to take all risk of injury to them and of personal injury to himself", and it was held that this contract did not exempt the company from responsibility for injuries caused by negligence, but, notwithstanding this decision, the case of Hart v. Pennsylvania R. R., 112 U. S. 331, was reaffirmed, upholding the agreed valuation of goods. "even in case of loss or damage by its negligence", as a just and reasonable mode of securing a due proportion between the amount for which the company might be responsible and the compensation which it received, and of protecting itself against extravagant and fanciful valuations." It was further held that the question of the right of railroad corporations to make contracts affecting "its liability as a common carrier is a question, not merely of local law, but of commercial law or general jurisprudence,

upon which this Court, in the absence of an express statute regulating the subject, will exercise its own judgment uncontrolled by the decisions of the court of the state in which the cause of action arises." However, this Court further said:

> "But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the Constitution or laws of the United States" (citing numerous cases).

This decision was rendered before Congress undertook to legislate upon this specific question. The Court expressly stated:

> "So long as Congress has not legislated upon the particular subject they (State Statutes) are rather to be regarded as legislation in aid of such commerce and as a right exercise of the police power of a state to regulate the relative rights and duties of all persons, and corporations, within its limits."

The Court concluded:

> "The statute now in question, so far as it confers liability for injuries happening within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. * * * "

In Pennsylvania R. R. v. Hughes, 191 U. S. 477, decided in 1903, a bill of lading was given in the State of New York for transporting a horse to a point in Pennsylvania, and contained a clause limiting the carrier's liability to a stipulated value in consideration of the rate paid. A shipper having been offered a bill of lading without such limitation, upon the payment of a

higher rate, signed a memorandum accepting the contract at the lower rate. The common law, as interpreted by the courts of New York and the federal courts, permits a common carrier to limit by contract its liability for its own negligence, but, as interpreted by the courts of Pennsylvania, the reverse was true. The shipment was from Albany, N. Y., to Cynwyd, in the State of Pennsylvania. The contract limited the value of the horse to $100, but the plaintiff recovered a verdict for $10,000. The through rate of freight was not filled out in the shipping receipt, but was collected by the agent at destination, and it was shown that the reduced tariff rate was the one collected. The horse was transported in safety to the end of the line of the New York Central and delivered to the Pennsylvania R. R. Company, and was injured while standing on the track of the Pennsylvania R. R. Company in the City of Philadelphia, by being run into by some other cars.

This case was tried and decided in the Supreme Court before the passage of the Hepburn Act. It was conceded at the trial that, under the law of the State of New York, where the contract was made, it was valid, and that the New York decisions were in harmony with the decisions of the Supreme Court in Hart v. Railroad, 112 U. S. 331, but as Congress had not then legislated upon this subject it was held that the question before the Court "was not a question of federal law, wherein the decision of the highest federal tribunal is of conclusive authority", and that the Pennsylvania courts had expressly declined to follow the rule laid down in the Hart case. It was admitted that the decisions upon the question were numerous and conflicting, and that "the federal courts, in cases in which they have jurisdiction, will doubtless continue to fol-

low the rule of the Hart case, but the higher court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court, where some right, title, immunity or privilege the creation of the federal power has been asserted and denied."

Such is the case now at bar. It is true that in this case some errors were assigned under the act to regulate commerce, but this was the original Act of 1887, but this point was not made in the trial of the case and was only assigned as error in the Supreme Court of Pennsylvania, and it was held to be a fact that "as there is no indication in the record that this question was raised or considered in the court below, it is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence." That was true then, but is not true now, and in the case at bar the point has been in the case from its inception. But this Court held that the point was properly raised, but that the decision of the Supreme Court of Pennsylvania did not deprive the railroad company of any rights it had under any act of Congress, but this Court added:

> "It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this Court, it would be lawful for that body to make provision as to contracts as to interstate carriers, permitting the carrier to limit its liability to a particular sum, in consideration of lower freight rates for transportation, but, upon an examination of the terms of the law relied upon, we fail to find any

such provision therein. * * * There is no sanction of agreements of this character limiting liabilities to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may, to this extent, indirectly affect interstate commerce contracts of carriage?"

Congress has now acted.

VI.

The Provision in the Live Stock Contract Requiring the Shipper to Serve Notice of Any Claim Upon the Carrier Within Thirty Days Was Valid and the Trial Court Should Have Given the Instruction Requested by the Railway Company (T. R., 234).

This is true under the decisions generally, and especially of this Court, and there is nothing in the Carmack Amendment to the contrary.

Express Co. v. Caldwell, 21 Wall. 264;
Queen of the Pacific, 180 U. S. 54, and numerous cases cited.

In the following cases it was expressly held that under the terms of the Carmack Amendment it is still permissible to provide in shipping contracts and bills of lading that notice of claim for damages must be made within a specific time, and that such provisions are not limitations of liability.

Chicago, Rock Island & Pac. Ry. Co. v. Williams, 142 S. W. 826;

St. Louis & S. F. R. R. Co. v. Keller, 119 S. W. 264;
St. Louis, I. M. & S. R. Co. v. Furlow, 117 S. W. 517.

In the case last cited the Court said:

"The stipulation in question does not exempt the defendant from liability imposed by that act, which extended the liability of the initial carrier for loss, damage or injury to property while in course of transportation over the line of a connecting carrier. Before it was enacted an initial carrier could not exempt itself from liability for loss, damage or injury incurred on its own line, yet it was lawful for it to enter into stipulation like the one in question when the shipment of the property was confined to its own line. For the same reason it can enter into such stipulations under the Hepburn Act as to loss, damage or injury suffered on the line of the connecting carrier."

Old Dominion Steamship Co. v. Flanary, 69 S. E. 1167.

In this case the Supreme Court of Appeals of Virginia said:

"In the case of Liquid Carbonic Co. v. Norfolk & Western Ry. Co., 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753, this subject was fully examined and the conclusion reached that

"'A condition in a bill of lading that claims for loss or damage shall be made in writing to the carrier's agent at the point of delivery promptly after the arrival of the property, and if delayed more than thirty days after the delivery of the property, or after due time for the delivery thereof, there shall be no liability upon the

carrier, is a reasonable provision and will be upheld. Such a provision contravenes no public policy and excuses no negligence, but is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged.'

"The reasonableness of the rule approved in the case just cited receives additional force from the fact that the liability of the initial carrier under the Carmack Amendment to the Interstate Commerce Act having been established, thus rendering it responsible for the delinquencies of a connecting carrier, or for those occurring upon a line other than its own, it should receive prompt notice of the fact that it is to be held liable, in order that it may take steps to indemnify itself by fixing the responsibility where it justly belongs."

McElvain v. St. Louis & S. F. R. Co., 131 S. W. 736.

In this case it was expressly held that the clause in the shipping contract requiring presentation of claims within thirty days was legal and would be upheld under the provisions of the Carmack Amendment. Such was the law in Missouri before the passage of the Carmack Amendment.

In this case the Court admitted that the question involved was a federal question and should be decided in accordance with the decisions of the Supreme Court and the federal courts generally, as it involved the proper interpretation of the Carmack Amendment. Consequently, following the decisions of this Court, the clause was upheld.

George v. C. R. I. & P. Ry. Co., 214 Mo. 551.

It is true that in Missouri and some other states the validity of these clauses is only upheld where it appears there is a special consideration therefor, but such is not the law according to the decisions of this Court, or the decisions generally. But in the case at bar there was a specific and special consideration for this clause, namely, a reduced rate, which, under the decisions in Missouri, if they are to control, would make this contract provision valid and enforceable.

McFadden v. Missouri Pacific Ry. Co., 92 Mo. 343.

VII.

The Clause in the Live Stock Contract Requiring Suit to Be Filed Within Ninety Days Was Valid Under the Carmack Amendment and the Court Should Have Held Accordingly (T. R., 234-5).

Ginn v. Ogdensburg Transit Co., 85 Fed. 985;
6 Cyc. L. & Pro. 508, and numerous cases cited;
Cox v. Central Vermont Ry., 170 Mass. 129;
North British Ins. Co. v. Railroad Co., 9 N. Y. App. Div. 4, affirmed in 158 N. Y. 726;
Central Vermont R. R. Co. v. Soper, 59 Fed. 79;
Thompson v. Chicago, Etc., R. R., 22 Mo. App. 321;
Gulf, Etc., R. R. Co. v. Gatewood, 79 Tex. 89;
McCarty v. Gulf, Etc., R. R., 79 Tex. 33;
Texas, Etc., R. R. Co. v. Hawkins, 30 S. W. 1113;
Ingram v. Weir, 166 Fed. 328.

It is true that in the States of Missouri and Texas statutes have been passed providing that contracts requiring filing of suit in less than the statutory period are invalid, but these local statutes cannot control con-

tracts made under the terms of the Interstate Commerce Act and the Carmack Amendment, and the decisions cited fully support our contention that, under the Interstate Commerce Act and the Carmack Amendment, stipulations in live stock contracts of this kind are valid. The Interstate Commerce Act and the Carmack Amendment can have but one meaning throughout the length and breadth of the United States, and cannot be controlled or modified by local state legislation.

Respectfully submitted,

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NUMBER 121.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,

v.

ROBERT L. HARRIMAN AND ALBERT C. HARRIMAN, COMPOSING A FIRM AND COPARTNERSHIP OF HARRIMAN BROTHERS, Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

STATEMENT.

This case comes to this court on a writ of error to the Court of Civil Appeals for the Fifth judicial district of the state of Texas upon the complaint of plaintiff in error, hereinafter called the Railway Company, that the decision of the

State court is against a "right, privilege or immunity specially set up or claimed under a statute of the United States," to wit, the Interstate Commerce act and the various amendments thereof.

The suit was instituted by the defendants in error, hereinafter called the shippers, in the district court of Grayson county, Texas, on the —— day of ————, 1908 (Rec. 1), (the exact date does not appear), and not on the 9th of February, 1909, as stated by plaintiff in error (when the first amended petition was filed), to recover the value of thirteen head of "fine show and sale cattle" and a herdsman's outfit, delivered to the railway company at Pilot Grove, in the State of Missouri, on the 30th of January, 1907, to be transported over its railway, and that of a connecting carrier, to Enid, Oklahoma.

The complaint, or petition, alleged (Rec. 1) that the cattle and other property above mentioned were delivered to, and received by, the railway company, as a common carrier, at its station of Pilot Grove, in Missouri, on the 30th of January, 1907, to be shipped to Enid, Okla., and that the shippers paid to said railway company, at Pilot Grove, the through freight on said property to the place of destination; that, through the carelessness and negligence of the defendant, particularly specified in the petition, the train upon which the cattle and other property were being carried, was derailed and wrecked and the cattle killed and the other property destroyed; that the cattle were of the market value of $15,000.00 and the equipment of the value of $100.00, for which judgment was asked.

The railway company set up and pleaded in its answer, among other things, a special contract (Rec. 3), and the questions for review by this court arise out of two of the provisions contained in said contract. These provisions are as follows (Rec. 152):

"8. The carrier does not ship live stock, or emigrant outfit, under this contract or at the rate hereon given, upon which its liability in case of any loss or injury, shall exceed the following prices per head:

* * * * * * * * * *

Each ox, steer or bull..... $30.00
Each cow 20.00

* * * * * * * * * *

and in case of any loss or damage thereto, by carrier's negligent transportation, or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above."

Paragraph "9" requires notice to the railway company, or the connecting carrier on whose line the property may be injured or lost, and then provides:

"Shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action for injuries resulting to said live stock as aforesaid, and no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of ninety days from the happening thereof, any statute or limitation to the contrary notwithstanding * * *"

The answer, in pleading said contract, alleged:

"That said contract was for the transportation of said cattle from Pilot Grove, Missouri, to Guthrie,

in what was then Oklahoma territory, now Oklahoma state; which shipment, therefore, constituted interstate commerce, and said contract was for the transportation of interstate commerce, and by the laws of the United States governing interstate commerce, was, and is, in all of its provisions, valid and binding." (Rec. 3.)

The reply put in issue the validity of the contract.

The railway company (Rec. 154) introduced this evidence:

"Mr. Head: We offer the following portion of I. C. C. tariff No. A-1636, M., K. & T. Local Distance Tariff No. 2548, applying on classes and commodities:

Missouri, Kansas & Texas Railway Co.,
The 'Katy' Route.
Local Distance Tariff No. 2548.
(Cancels No. 737.)

Applying on classes and commodities between stations on the Missouri, Kansas and Texas Railway as follows:

Between stations in	And stations in
Indian Territory.	Oklahoma Territory.
Missouri or Kansas.	Indian Territory.
Missouri or Kansas.	Oklahoma Territory.

And locally between stations in the Indian and Oklahoma territories.

Rates in cents per 100 lbs.

Cattle (see Rule 3.)

Distance.	Commodities—Carloads.
380 miles and over 370	26½

Rule 3.

Live Stock—Continued.

Limitation of Liability.—Rates provided on live stock will apply only on shipments made at owner's risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current live stock contract provided by this company, the contract to be first duly executed in manner and form provided therein.

One hundred and twenty per cent of the rates named in this tariff will be charged on shipments made without limitations of carrier's liability at common law and under this status, shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided for herein."

It does not appear anywhere in the record that "the terms and conditions of the current live stock contract," referred to in the above tariff sheet, or any copy of the live stock contract containing these terms and conditions, was filed with the Interstate Commerce Commission; nor is there anything in the record to show that any paper of any character was filed with said commission containing a "rule or regulation" that the above rates were only to be charged where the valuation of the property did not exceed the amounts set out in the eighth paragraph of said contract above quoted, or that a suit for damages should be barred if not brought within ninety days, as provided in the ninth paragraph. The record does not show that any such rule or regulation was so filed.

The shipment was from Pilot Grove, Missouri, to Enid, Oklahoma. Defendant's railway only extended to Guthrie, Oklahoma. The contract (Rec. 150) expressly prohibited the

local agent at Pilot Grove from inserting, as the destination, any point beyond the line of his company. At the blank in the contract stating the destination of the property are these words, "Do not insert any station beyond our line."

The *contract* contains no rate whatever for the service to be rendered by the railway company in the transportation of the property. The blank form of the contract was prepared so that the rate per hundred pounds from Pilot Grove to the destination should be inserted before the contract was signed. These blanks were never filled. That part of the contract is as follows:

> "The carrier agrees to let the shipper one box car, numbered 51476 P. M., which the shipper has selected and desires to use for the shipment of 13 head of cattle consigned to Harriman Bros. at Enid, O. T., and when loaded and delivered to carrier, to haul the same, together with the shipper party or parties in charge thereof, from Pilot Grove to Guthrie, O. T., all as hereinafter provided at the
>
> (Do not insert any station beyond our line)
>
> rate of —— dollars per car, or —— cents per hundred pounds from ——— to destination, subject to minimum weights and length of cars provided for in tariff, the same being a special rate, which the carrier guarantees, and less than the regular tariff rate applying on shipments of live stock not covered by this special contract."

There was written, in pencil, across the face of the contract, "Paid 80.30." (Record, 150-153.)

The contract, in addition to the paragraphs above set out, contains a provision that if the destination of the property was on the line of the Missouri, Kansas & Texas Railway Com-

pany, that company agreed to deliver the property to the consignee, but if it was to be transported by a connecting carrier, then to deliver to the connecting carrier, and added this clause:

> "It being understood and agreed that the duty and liability of the Missouri, Kansas & Texas Railway Company, and that of every other carrier transporting said cars hereunder, absolutely ceases and terminates upon delivery by it of said cars to its connecting carrier."

Further, in the ninth clause, which is quoted above, there is an express provision that no suit shall be brought for injury to the property, against any carrier, *except the one on whose lines the injuries occur.*

There is a further provision in the contract binding the *shippers* not to confine the live stock for a longer period than twenty-eight consecutive hours without unloading them for rest, water and feed.

This statement is in the heading of the live stock contract (Rec. 150), to wit:

> "Rules and Regulations for the Transportation of Live Stock.
>
> *Notice.*
>
> This company has two rates on live stock.
>
> Ordinary live stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be at less than published tariff rate applying thereon when transported at carrier's risk.

All kinds of live stock, carrier's risk, will be taken under the provisions and at rates provided for by existing tariffs and classification.

Special Live Stock Contract No. 4."

(Then follows contract.) (Rec. 150.)

The testimony as to the real option offered to shippers and the existence of two rates was as follows:

L. G. HUNTER, local agent at Pilot Grove, testified:

CROSS-EXAMINATION BY JUDGE WOLFE (Rec. 156).

"I have been station agent at Pilot Grove about four years. I was there when this rate went into effect. We ship a good many cattle from Pilot Grove, and have during each year I have been there. During the whole time I have been there, I have never used any other rate except this cattle rate I have shown here. I have never shipped any cattle from Pilot Grove under any other rate than this cattle rate shown in figures just as this twenty-six and a half cents is shown. The rate that has been charged on all those numerous shipments that have been made since I have been agent there has been the same rate as I pointed out here—not the same cents, of course, but based on the same rate as the twenty-six and a half cents is based. We use the same contract for all. That is the only contract I had in that office.

REDIRECT EXAMINATION BY JUDGE HEAD.

I say I have never made a shipment from Pilot Grove on any other contract except this kind. Nobody has ever requested to make a shipment without a contract of this kind.

RECROSS-EXAMINATION BY JUDGE WOLFE.

When I was asked to quote rates, I always quoted the same rate and figured in the same manner as the twenty-six and a half cents was in this instance; universally quoted that rate."

JOHN W. CONNER (Rec. 156) testified that he was the commercial agent of the railway company, and, as such, solicited freight and looked after the freight business generally. He then said (Rec. 157):

"We could make a rate on the Katy from Pilot Grove to the junction point and then from junction point to destination on the other road. On a shipment of cattle moving from Pilot Grove to Enid, Oklahoma, Guthrie would be the nearest junction point, I think. If the cattle went by Guthrie, the Katy had a rate applicable to that shipment to Guthrie. They had a live stock tariff making rates for Kansas City and St. Louis, and they had a distance tariff on interstate business. (Witness is handed a paper and asked to state what it is.) This is a distance tariff on interstate shipments, Missouri, Kansas and Indian Territory, and Missouri, Kansas and Oklahoma Territory. This is a local distance tariff. If a shipment of cattle was delivered to the M., K. & T. for shipment to Enid via Guthrie, if this tariff made a lower rate from Pilot Grove to Guthrie than the live stock rate made from St. Louis to Guthrie, we would use this tariff. The live stock tariff I refer to is the M., K. & T. live stock tariff. (Witness is handed another paper and asked to state what it is.) This is the M., K. & T. live stock tariff. If tariff I. C.

C., No. 1636, being the local distance tariff, quotes a less rate from Pilot Grove to Guthrie than tariff I. C. C., No. 2713, then tariff No. 1636 applies. I would have to take the distance table to figure on which takes the lowest rate. The distance is three hundred and eighty miles. The local distance tariff shows a rate of 26½ cents a hundred. The other tariff is 38 cents. So that tariff 1636 would apply. In January, 1907, we did not have any other tariffs that applied to the shipment of cattle from Pilot Grove to Enid, via Guthrie, than these two tariffs."

As to the defendant's knowledge of the value of the cattle and that there was no misrepresentation in regard thereto, the testimony was as follows:

ALBERT C. HARRIMAN (Rec. 72) testified:

"While negotiating with the agent for a low rate I couldn't say whether that I disclosed to the agent that these were show cattle or not. My uncle attended to that part of it. I did not apprise him of the great value of these cattle. The agent at home knew what—that we had show cattle, and where we were going, and I had talked to him before about it, but I said nothing to him about these particular cattle."

The witness further testified (Rec. 176):

"The agent at home knew that we had show cattle and where we were going, and I had talked to him before about it, but I said nothing to him about these particular cattle.

"In the contract which I made with the railroad company, defendant, pertaining to the ship-

ment of these cattle, I think the value placed upon these cattle in that contract reads as follows: 'The four bulls were valued at $30 each, total $120 for the bulls, and the nine cows were valued in that contract at $20 each, making a total of $180.' I signed that contract. I did not state to the agent, Hunter, at Pilot Grove at that time that that was the value of these cattle. I don't know how those values happened to be written in the contract. The agent did not inquire of me as to the value of this live stock. I didn't know that the railroad company charges a higher rate for shipment of high-grade cattle and valuables than it does for shipping cattle of ordinary value."

By the statutes of Texas, the shipper has two years in which to bring a suit against a common carrier for damages to his property through the negligence of the carrier, and the limitation of 90 days in the contract, under that statute, was void. Likewise, it was agreed that, in the State of Missouri the statutes prohibited any contract for a shorter period for instituting a suit than that fixed by the general statute of limitations.

The evidence tended to show that the cattle killed were fine pedigreed animals, consisting of a show herd, composed of bulls and cows, and were intended to be exhibited at the Oklahoma fair. The testimony as to value, as stated by the Civil Court of Appeals, ranged from $40.00 for the lowest animal up to $8,000.00 for one of the large bulls. The jury found the total value to be $10,640.00, which was well within the testimony.

The trial court (Record 14) charged the jury that the provision in the contract limiting the amount of recovery to the amounts stated in said contract was invalid; and,

further, that the provision that the suit should be barred unless brought within ninety days was void, and should be disregarded.

Plaintiff in error prayed the court for the following special charges, which were refused (Rec. 235):

> "In the contract, under which the cattle in question were being carried, it is provided that no suit should be brought by plaintiffs against defendant to recover for any loss or injuries to said stock after the lapse of ninety days from the happening thereof, any statute of limitation to the contrary notwithstanding, and you are instructed that the validity of said provision must be determined by the act of Congress of the United States, entitled 'An act to amend an act,' entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29, 1906, and by an act, entitled 'An act to regulate commerce,' approved February 4, 1887, and that under said acts said provision is valid and binding; and inasmuch as this suit was not commenced within the said ninety days, you will find in favor of the defendant."
>
> "In the contract, under which the cattle in question were being carried, it is stipulated and agreed that each bull did not exceed in value $30.00, and that each cow did not exceed in value $20.00, and that in case of any loss or damage thereto plaintiffs should not be entitled to recover more than such stipulated valuation, and you are instructed that the validity of this provision of

the contract is governed by the acts of Congress of the United States, and especially by the act, entitled 'An act to amend an act,' entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the 'Interstate Commerce Commission,' approved June 29, 1906, and by the act entitled 'An act to regulate commerce,' approved February 4, 1887, and you are further instructed that under said laws said contract is valid and binding, and in case you find for plaintiffs in arriving at the amount of your verdict you will not allow for any bull more than $30.00, nor for any cow more than $20.00."

An assignment of error is based upon the refusal of each of said charges.

There was a verdict and judgment for the defendants in error (plaintiffs below) for $10,640.00, rendered on the 13th of February, 1909.

From this judgment, an appeal was prosecuted to the Civil Court of Appeals for the Fifth judicial district of Texas, where the judgment was affirmed in a written opinion. (Rec. 205.)

The Civil Court of Appeals, in its opinion, holding the special contract invalid, placed its decision upon two grounds, one upon general and local law, without reference to the interstate commerce act (Rec. 207), saying:

> "It was stipulated in the contract that the carrier's liability for the loss of each bull was $30.00, and for the loss of each cow it should be $20.00.

"The decisions of this state are to the effect that an agreement in a contract for the transportation of live stock made in this state, which provides that in the event of loss the shipper shall not recover the value of his property lost by the negligence of the carrier, is against public policy and void. Railway v. Maddox, 75 Tex. 300; Railway v. Ball, 80 Tex. 606; Railway v. Greathouse, 82 Tex. 110; Railway v. Anderson, 63 S. W. 1024; Railway v. Davis, 31 S. W. 310; Railway v. Montgomery, 16 S. W. 181. This court held in the case of Railroad Company v. McIntyre, 82 S. W. 346, that a provision in a contract executed in Spartansburg, South Carolina, for the shipment of freight from that place to Ladonia, Texas, stipulating that in the case of loss the shipper was only to recover $5.00 for each 100 pounds of freight, was against public policy and void, in the absence of a consideration for such limitation. In that case the bill of lading recited that the provision was made in consideration of reduced rate at which the goods were shipped. In the instant case there was in fact no reduction in the rate at which the cattle were to be carried and no consideration for the limitation. We think it clear that the stipulation in the contract of transportation fixing the liability of the carrier at $30.00 for each bull and $20.00 for each cow unreasonable and void. The testimony showed that the value of the cattle ranged from $40.00 for the lowest to $8,000.00 for the highest per head. The jury found the value of the 13 head of cattle was $10,640.00. According to the valuation, as fixed by the contract, the four bulls would have been worth $120.00 and the nine

head of cows $180, making $300. It is clear that the value of the cattle was arbitrarily fixed by the carrier in the contract for transportation without regard to their real value."

The court (Rec. 208), as another ground for affirming the judgment, then took up the "Carmack amendment" of June 29, 1906, to the interstate commerce act, saying:

"Again, it is provided by act of Congress, passed June 29, 1906, known as the Hepburn act (U. S. Comp. Supp. 1907, p. 909), 'that any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to lawful holder thereof for any loss, damages, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' The shipment in this case was from Pilot Grove, in the State of Missouri, to Enid, in the state of Oklahoma, and falls within the terms of this act, making a carrier liable for loss, damage or injury to property while being transported from a point in one state to a point in another state.

"We understand that appellant does not controvert this construction, but contends that section 20 of this act, which embraces the above clause, is unconstitutional. We do not regard it necessary to go into a discussion of the constitutionality of this section of the act. It was reviewed and held constitutional by the Court of Civil Appeals for the Fourth district, in Railway v. Piper, 115 S. W. 107, in which a writ of error was refused by the Supreme Court. It was also held constitutional in an able and exhaustive opinion by Judge Rodgers in Smeltzer v. St. L. & S. F. R. R. Co., 158 Fed. Rep. 149. See also Riverside Mills v. Railway Co., 168 Fed. Rep. 987, and Railway Co. v. Grayson, 115 S. W. 193. We hold the act constitutional, and that by its terms the limitation under consideration was void."

The Supreme Court of Texas has jurisdiction to review the judgments of the Civil Courts of Appeals in that state, upon writ of error, but refused a writ of error applied for by the railway company in this case.

BRIEF OF ARGUMENT.

I.

THIS COURT, IN A CASE FROM A STATE COURT, WILL ONLY REVIEW THE FEDERAL QUESTIONS PRESENTED BY THE RECORD, AND WHERE THERE ARE OTHER ADEQUATE GROUNDS, BASED UPON GENERAL OR LOCAL LAW, FOR THE JUDGMENT, THE WRIT OF ERROR WILL BE DISMISSED OR THE JUDGMENT AFFIRMED.

Eustis v. Bowles, 150 U. S. 361.

Leathe v. Thomas, 207 U. S. 93.

Klinger v. Missouri, 80 U. S. 257.

Seabard A. L. R. Co. v. Duvall, 225 U. S. 477.

The Civil Court of Appeals of Texas held (Rec. 207) that the provisions of the special contract fixing an arbitrary value upon the cattle, without regard to their real value, was void upon principles of general and local law, without reference to the Interstate Commerce Act or its amendments. The opinion of that court also declared that the limitation to ninety days of the time for bringing suit was in direct violation of the statutes of Texas, and that the law of the forum should govern, but also held that the limitation was invalid under the statutes of Missouri, if the laws of that State were applicable.

It was for the state court to determine the applicatory law, and also to decide what that law permitted and what it inhibited. This court will not review its rulings upon these questions.

In Leathe v. Thomas, 207 U. S. 93, it was said:

> "It is admitted that the general and well-settled rule is that, in a case coming from a state court, this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock v. Memphis, 20 Wall. 590; Sauer v. New York, 206 U. S. 536. It is further admitted that a decision upon these questions must have been necessary to the decision of the case. So that if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. Murdock v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds, this court commonly does not inquire whether the decision upon them was, or was not, correct or reach a Federal question by determining that they ought not to have been held to warrant the result."

Eustis v. Bowles, 150 U. S. 361, presented the same question, and this language was used:

> "It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

In Klinger v. Missouri, 80 U. S. 257, Justice Bradley said:

> "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment upon such independent grounds, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one."

This court will not review the construction given by the State court to the laws and decisions of Missouri and Texas, and as to the application of the same to the facts in the record. No Federal question is presented by the decision of these questions. They were solely for the determination of the state court, and its judgment upon these propositions is final.

The only Federal question upon that branch of the case arises out of the contention, in this court, of the railway company, that all state statutes and the rules laid down in the decisions of the courts of the several states as to the liability upon contracts for interstate shipments, are superseded and rendered nugatory by the Interstate Commerce Act and its amendments, and that the decision of this court in Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477, announcing a contrary doctrine, should no longer be followed. This will be discussed later in the brief.

The Texas Civil Court of Appeals further discussed, as an *additional* ground for its decision, the effect of the "Carmack amendment" upon the carrier's special contract limiting

its liability, saying that such limited liability was prohibited, and adding:

> "We understand that appellant does not controvert this construction, but contends that section 20 of this act, which embraces the above clause, is unconstitutional." (Rec. 208.)

In Seaboard A. L. R. Co. v. Duvall, 225 U. S. 477, this rule was laid down:

> "It was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the court. 'It must appear on the face of the record that it was, in fact, raised; that the judicial mind of the court was exercised upon it, and then a decision against the right claimed under it,' or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error."

At the time the decision in the present case was rendered there were and there have been since rulings by other courts that the Carmack amendment prohibited such special contract as is relied upon by the carrier here. Galveston H. & S. A. R. Co. v. Piper, 115 S. W. 107; Kansas City. So. R. Co. v. Carl, 121 S. W. 932; St. L., I. M. & S. R. Co. v. Pape, 140 S. W. 265.

So the state court did not enter upon a discussion of the proper construction of the act, stating, in its opinion, as

above set out, the understanding of the court "that appellant does not controvert this construction," but was relying upon the unconstitutionality of the act.

If it can be said that the construction of the Carmack amendment to the Interstate Commerce Act by the State court was adverse to the construction contended for by the plaintiff in error, and that the railway company "specially set up" in that court and sufficiently relied upon a contrary construction to bring that question here for review, still the meaning of the act becomes immaterial if the other grounds upon which the decision rests are not in *conflict* with the Interstate Commerce Act.

II.

THIS COURT HAS DECIDED THE CONSTITUTIONALITY OF THE CARMACK AMENDMENT TO THE INTERSTATE COMMERCE ACT CONTRARY TO THE CONTENTION OF THE RAILWAY COMPANY, AND THE ASSIGNMENT OF ERROR BASED UPON THE UNCONSTITUTIONALITY OF THAT ENACTMENT IS NO LONGER OPEN TO CONSIDERATION.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186.

Galveston H. & S. A. R. Co. v. Wallace, 223 U. S. 481.

The state appellate court accepted, without examination, a *construction* of that act that would prohibit special contracts by a carrier of the character relied upon here.

While this court has not passed upon that construction, and it has been denied by several state courts, yet others have adopted it.

Kansas City S. R. Co. v. Carl, 121 S. W. 932.

Southern Pac. Co. v. Crenshaw, 63 S. E. 865.

Louisville & N. R. Co. v. Warfield, 65 S. E. 308.

Galveston H. & S. A. R. Co. v. Piper, 115 S. W. 107.

If that construction is correct, or if the plaintiff in error failed to set up and claim the construction of the act contended for in this court so as to present the question for review, the judgment of the state court should stand without reference to the other questions discussed later.

III.

A CARRIER MAY FIX ITS RATES FOR INTERSTATE SHIPMENTS WITH REFERENCE TO THE SERVICE TO BE PERFORMED, AND MAY ADOPT RULES AND REGULATIONS CONCERNING THE SAME; BUT A SHIPPER WILL NOT BE BOUND BY A CONTRACT, WHICH IS INVALID AND PROHIBITED BY LAW, SIMPLY BECAUSE THE RATE COLLECTED IS CONDITIONED UPON THE SIGNING OF SUCH VOID AGREEMENT.

Drey & Kahn Glass Co. v. Missouri Pacific Ry. Co. (Mo. App.), 136 S. W. 757.

O'Connor v. Great Northern Ry. Co. (Minn.), 136 N. W. Rep. 743.

Hooker v. Boston R. Co. (Mass.), 95 N. E. Rep. 945.

Adams Ex. Co. v. Mellinchamp (Ga.), 75 S. E. Rep. l. c. 600.

Cramer v. Chicago, R. I. & P. Ry. Co. (Iowa), 133 N. W. Rep. l. c. 387.

The Interstate Commerce Act was intended primarily to regulate rates. "The chief purpose," as stated by this court, "of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences and to prevent special and secret agreements in respect of rates for transportation." Kansas City S. R. Co. v. Albers Com. Co., 223 U. S. 573.

No discrimination between shippers will result from declaring void a special contract prohibited by law or contrary to public policy. The same rule will apply to all shippers. If one is not bound upon a contract of that character others would not be held to a performance of its requirements. The same treatment would be accorded to all under similar circumstances.

It does not follow that, because the carrier files with the Interstate Commerce Commission a rate based upon a special contract changing its common-law liability, such contract must be enforced to avoid discrimination. Such a rule would make the carrier's liability depend, not upon the contract, but upon the rate that happened to be paid. It would put it within the power of the carrier to quote to its patrons only the rate based upon the special contract adopted by it, without mentioning any other rate, and then avoid any liability beyond that specified in such special contract. The rate paid would determine the liability, and not the special contract, in that event.

The argument of the plaintiff in error, in the second point of its brief, in its last analysis, amounts in effect to this: If the carrier files two rates, one to be given to those who sign a special contract limiting the carrier's liability as the carrier sees fit, and a higher rate to those who refuse such a contract, the payment of the special contract rate, *without more, necessarily* fixes the carrier's liability according to the special contract; otherwise there will be a discrimination between shippers under the two rates.

The rate collected, in the first instance, by the carrier would, in that event, determine its liability.

The discrimination would be the same if the special contract was procured from the shipper by fraud or misrepresentation, or if it contained illegal provisions expressly prohibited by law. In fact, the same result would follow if there

was no contract at all and if the shipper had expressly refused to sign one. If, for any reason, the carrier, by any means should, in advance, only collect the tariff rate based upon a special contract, the discrimination would be identically the same whether any contract was signed or not. So the carrier would only have to induce the shipper to pay the lower rate when the goods are offered for transportation to secure exemption from liability, regardless of the manner in which that was brought about. And it was so contended by the carrier in Drey & Kahn Class Co. v. Missouri Pacific Railway Company, before the St. Louis Court of Appeals, in the State of Missouri, 136 S. W. 757, but the court held that the mere shipment at the lower rate did not carry with it a contract exempting the carrier from liability, saying:

> "Though it be true that the Interstate Commerce Act requires posting of the schedules and rates to the end of disseminating information thereof to the public, we believe it to be an extreme view to say that such constructive knowledge is sufficient as the basis of a contract limiting the liability of the carrier, through an acceptance, by the mere act of shipping the goods alone, and without an express assent thereto on the part of the shipper. Especially is this true when it is remembered that it is required contracts forgiving a part of the liability annexed by law to the calling of the common carrier shall be clear, special and express."

This court has held that the tariff rates are binding upon shipper and carrier alike, and that the correct rates may be collected at any time. If rates are based upon an invalid or abortive attempt to make a special contract, or upon the making of one declared void by law, the shipment would stand

as if there had been no attempt to make a special contract and the rights of the parties adjudged upon that basis.

The Supreme Court of Minnesota, in O'Connor v. Great Northern Railway Co., decided June 14, 1912, 136 N. W. 743, had the same argument pressed upon its attention and made this answer to it:

> "Defendant also contends that the freight rate of $1.00 per hundredweight was given on the agreement that the defendant's liability was limited to $10.00 per hundredweight, and the effect of permitting a recovery for more now would amount to a discrimination in favor of plaintiff prohibited by the Interstate Commerce Act. . . . . Of course, as to the tariff rates, the published tariffs control, and it is not an open question whether these rates are just or reasonable; but we fail to see such a connection between these rates and the attempted limitation of the carrier's liability, that the courts may not ascertain and determine the validity of the latter."

In Hooker v. Boston & M. R. Co., decided by the Supreme Judicial Court of Massachusetts, 95 N. E. 945, the court said upon this subject:

> "It is apparent that the binding force of the limitation as to amount of recovery in case of loss must stand, if it can stand at all, as being a part of the established rate when filed with the commission and with its officers, and thus binding upon all the traveling public without knowledge of their contents, and not upon the proposition that by being posted 'in two public and conspicuous places in every depot' the public were thereby constructively notified. . .

> "The pivotal question then is whether the limitation as to liability for loss of baggage transported without extra charge is a part of the passenger rate or tariff, or whether it is a subsidiary incident to the main matter of fare. We are of opinion that it is not an essential element in the fare for transportation of passengers. Limitation of liability by contract in case of loss has not been abolished by the interstate commerce act."

The Supreme Court of Georgia, in discussing this argument in Adams Express Co. v. Mellichamp, 75 S. E. 596 l. c. 600, said:

> "They" (referring to such contracts limiting the carrier's liability) "could easily be made devices for the avoidance of the prohibitions made by Congress. It was argued that if the shipper, who failed to fill the blank in an express receipt left for the statement of the value, were permitted to recover the actual value of the property lost, it might be used as a means of avoiding the terms of the act. We think there would be much more danger of this, if shippers and carriers were permitted to make contracts limiting liability without regard to actual value, or if carriers could accomplish the same result because of a printed form of receipt and the leaving unfilled of a blank for the insertion of the value, regardless of actual value."

The Supreme Court of Iowa, in Cramer v. Chicago, R. I. & P. Ry. Co., decided November 20, 1911, 133 N. W. 387, had before it a case in which a special contract was urged upon its attention, and it was contended that to avoid the special con-

tract and hold the carrier to its common-law liability would, in effect, cause a discrimination. The court said:

> "The question in the instant case is not primarily one of rates, but of the right of the carrier to limit its liability for negligence. Of course, it is permissible to draw analogies from the cited cases, but there is nothing in the decisions which hold to the doctrine that the Interstate Commerce Commission has either, expressly or impliedly, ratified and approved such contracts as are here involved. Our conclusions find support in Latta v. Chicago, St. P., M. & O. R. R. Co., 172 Fed. 850, 97 C. C. A. 198.
>
> "It is argued, however, that our construction of the law affords a ready means whereby rebates may be offered to shippers, and that for this reason it should not be adopted. This argument, while plausible, is not persuasive. Of course, there are many devices which might be adopted in order to avoid the law against rebates and discriminations; but it seems to us in upholding the stipulations relied upon in this case, we would point the way to unlawful discriminations in rates quite as effectively as by denying the validity thereof. It must be assumed, in solving the question now before us, that plaintiff suffered a loss to the extent claimed and that defendant is relying upon a contract limiting its liability for such loss. No rebate is being granted to the shipper, either directly or inferentially. Compensation for his loss is all he seeks and is all that has been awarded. No discrimination was intended in granting him the rate which was charged, and even if that had been the intent, we doubt whether the defendant is in a position to avail itself of such discrimination

in an action against it for negligence. Even if fraud on the part of the shipper is charged, it is unavailing under the rule announced in Winn v. American Express Co., supra. See also Betus v. Railroad, 129 N. W. 962. It is not alleged that the rate given the plaintiff was discriminatory in character, or that it was unreasonable. The sole defense is that he agreed to a limitation upon the carrier's liability, in case of injury to the property, even if such injuries were due to negligence, and it is argued that such agreement is good because the Interstate Commerce Commission approved thereof or so treated the schedule filed as to ratify, not only the rate, but all proposed stipulations and agreements contained in the contracts entered into between the carrier and the shipper or embodied in the bill of lading issued by the railroad company. There is, as we think, no merit in the contention that a rebate or concession has been granted to the shipper. Cases relied upon by appellant in support of its present contention are not in point."

The courts are not bound, on account of the rates collected, to hold valid a contract that the law-making power has declared to be invalid.

It is said that the rate collected from the shippers in the case at bar was based upon the terms and provisions of the special contract; that the special contract must be enforced, otherwise, there will be a discrimination between the shippers in this case and those from whom the higher rate was collected.

One provision of the contract is as essential to the rate as another. The rate, if based upon the contract, was upon the acceptance of the contract as an entirety. It will hardly be contended that the provision in the special contract ex-

empting the initial carrier from liability after the property should be put in the hands of a connecting carrier can stand, in view of the express prohibition of the Interstate Commerce Act. Suppose this had been the only provision in the special contract and the rate had been based upon it, and a higher rate fixed without that stipulation, would it be enforced to prevent a discrimination in the rates? If the common-law liability exists, the shipper may be bound for the proper tariff rates for shipments of that class—but limitations void by law cannot be validated by the rate collected.

IV.

THE RECORD IS ENTIRELY BARREN OF ANY EVIDENCE TENDING TO SHOW THAT THE CURRENT LIVE STOCK CONTRACT ATTEMPTED TO BE ENFORCED IN THIS CASE "CONTAINING THE RULES AND REGULATIONS" FOR THE VALUATION OF CATTLE AND THE LIMITATION OF THE TIME FOR BRINGING SUITS, AND THE EXEMPTION FROM LIABILITY FOR THE NEGLIGENCE OF CONNECTING CARRIERS, WAS EVER FILED WITH THE INTERSTATE COMMERCE COMMISSION, OR THAT ANY TARIFF SHEET SO FILED CONTAINED ANY SUCH RULES AND REGULATIONS.

The evidence upon this point appears on page 154 of the record and states:

> LIMITATION OF LIABILITY.
>
> "Rates provided on live stock will apply only on shipments made at owner's risk, with limitation of liability on the part of the railroad company as common carrier, under the terms and conditions of the current live stock contract provided by this company, the contract to be first duly executed in manner and form provided therein."

The terms and conditions of the current live stock contract do not appear from this sheet, nor does it appear that the form of the contract was filed as a part of said tariff rates.

The rates were based upon a shipment at the "owner's risk" and with a "limitation of the carrier's liability." This would ordinarily release the carrier as an insurer, but not from damages for its own negligence. There is nothing in the tariff sheet to show that the rates were based upon an *arbitrary valuation of cattle* (Rec. 154), and *a limitation of the time for bringing suit*, or upon exemption from a liability imposed by the Interstate Commerce Act *for the negligence of connecting carriers*. To make these so-called "rules and reglations" a part of, and the basis for, the tariff rates, it was essential, under the Interstate Commerce Act, to file them with the commission. Sec. VI of interstate commerce act.

V.

DEFENDANTS IN ERROR DID NOT MISREPRESENT THE VALUE OF THEIR CATTLE FOR THE PURPOSE OF OBTAINING A LOWER FREIGHT RATE THAN THEY WOULD OTHERWISE HAVE SECURED IF THE TRUE VALUE HAD BEEN KNOWN, OR FOR ANY OTHER PURPOSE. THERE WAS NO VIOLATION, OR ATTEMPT, OR INTENT ON THEIR PART, TO VIOLATE THE PROVISIONS OF THE INTERSTATE COMMERCE ACT PROHIBITING REBATES, DISCRIMINATIONS, ETC., AND NO MISDEMEANOR COMMITTED. THE SECTION QUOTED IN THE BRIEF OF PLAINTIFF IN ERROR HAS NO APPLICATION.

When the shippers asked the agent of the railway company for the rate to Enid, nothing was said about the value of the cattle, and no inquiry was made as to their

value by the agent of the railway company. The rate was quoted without any inquiry as to the value. Nothing was said about the special contract or its provisions. The shippers were told what the rate was and only one rate was mentioned. In fact, the agent testified that, during the four years he had represented the railway company at the place of shipment, no other rate had been quoted. (Rec. 156.) He said:

> "When I was asked to quote rates, I always quoted the same rate and figured in the same manner as the twenty-six and a half cents was in this instance. Universally quoted that rate."

No option was offered to the shippers.

The blank in the contract for the insertion of the rates was never filled and the contract, upon its face, only was for a shipment to Guthrie, while the pencil memorandum showed that the freight was paid to Enid.

There was no attempt on the part of the shippers to secure any advantage over others similarly situated, and certainly no misrepresentation as to values for the purpose of obtaining a lesser rate.

ALBERT C. HARRIMAN, one of the defendants in error, testified (Rec. 176):

> "I don't know how those values happened to be written in the contract. The agent did not inquire of me as to the value of this live stock. I did not know that the railroad company charged a higher rate for shipments of high-grade and valuable cattle than it does for cattle of ordinary value."

Again (Rec. 176):

> "The agent at home knew that we had show cattle and where we were going, and I had talked to him before about it. But I had said nothing to him about these particular cattle."
>
> "But whether or not the shipper or the company, or both, may be subject to the penalties provided by the act, this does not prevent the shipper from recovering the value of his property lost by reason of the negligence of the carrier."

Adams Express Co. v. Mellinchamp, 75 S. E., l. c. 600.

VI.

ONE OF THE GROUNDS FOR THE DECISION OF THE STATE COURT, AND WHICH, OF ITSELF, IS SUFFICIENT TO SUSTAIN THE JUDGMENT, WAS THAT UPON THE GENERAL AND LOCAL APPLICATORY LAW, THE SPECIAL CONTRACT, ATTEMPTING TO LIMIT THE CARRIER'S LIABILITY FOR ITS OWN NEGLIGENCE, AND FIXING AN ARBITRARY AND UNREASONABLE VALUE UPON THE CATTLE, WAS VOID. THIS COURT HAS EXPRESSLY HELD THAT THERE IS NOTHING IN THE INTERSTATE COMMERCE ACT TO PREVENT A STATE COURT FROM ENFORCING ITS OWN RULES UPON THIS SUBJECT, AND THAT A JUDGMENT BASED UPON THE STATE LAW AS CONTAINED IN ITS STATUTES OR DECISIONS RAISES NO FEDERAL QUESTION, SO THE RECORD IN THIS CASE PRESENTS NO FEDERAL QUESTION WHICH HAS NOT HERETOFORE BEEN DETERMINED BY THIS COURT ADVERSELY TO THE PLAINTIFF IN ERROR.

Pennsylvania Ry. Co. v. Hughes, 191 U. S. 477.
Chicago, M. & St. P. R. R. Co. v. Solan, 169 U. S. 133.
Savage v. Jones, 225 U. S. 551.

The Hughes case, *supra*, is the leading case upon this subject. This court quoted with approval from the opinion of the Supreme Court of Pennsylvania the following:

> "The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of this act seems to be to secure continuous carriage and uniform rates and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in anyway with the legitimate exercise of interstate commerce."

This court added:

> "It may be assumed that, under the broad power conferred upon Congress over interstate commerce, as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But, upon examination of the terms of the law relied upon, we fail to find any such provision therein."

Further:

> "We can see no difference in the application of the principles based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts."

It is said, however, that the Hughes case should no longer be followed, and that amendments have been made to the Interstate Commerce Act since that decision was rendered.

No amendment has been pointed out that *permits* carriers to make such special contracts or that *prohibits* the states from enforcing their own rules in regard to their validity.

That result is attempted to be reached only by deductions and inferences.

It must be presumed that Congress knew that many of the states, either by statute or by decisions of its courts, declared such special contracts void and refused to enforce them, and that this court, in the Hughes case, had upheld the right of the states so to do, in the absence of Congressional legislation to the contrary. If it had been intended to supersede the state laws upon the subject and to *permit* such contracts, it would doubtless have been so stated in express terms, and not left to construction.

The Hughes case was cited with approval by this court in Savage v. Jones, 225 U. S. 501, handed down June 7, 1912, where Mr. Justice Hughes, speaking for the court, said:

> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to cir-

> cumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustrations."

There is nothing in the Interstate Commerce Act, or its amendments, since the opinion in the Hughes case, *supra*, expressly permitting such special contracts by the carrier or overturning the rule laid down in that case.

The effect of the Interstate Commerce Act and the decision in the Hughes case, *supra*, has recently been before several state courts. Practically the same contention made here by plaintiff in error was considered by the Supreme Court of Georgia in Adams Express Co. v. Mellinchamp, decided August 13, 1912, 75 S. E. 596; also Southern Express Co. v. Hanaw, 134 Ga. 445; by the Supreme Court of Minnesota in O'Connor v. Great Northern R. Co., decided June 14, 1912, 136 N. W. 743; by the Supreme Judicial Court of Massachusetts in Hooker v. Boston & M. R. Co., September 6, 1911, 95 N. E. 945; by the Supreme Court of Tennessee in Louisville & N. R. Co. v. Smith, February 18, 1911, 134 S. W. 866; by the Supreme Court of Iowa, Cramer v. Chicago, R. I. & P. R. Co., November 20, 1911, 133 N. W. 387; and by the United States Court of Appeals for the Eighth circuit, July 26, 1909, Latta v. Chicago, St. P. & M. R. Co., 172 Fed. 850.

Lumpkin, J., speaking for the Supreme Court of Georgia, in Adams Express Co. v. Mellinchamp, *supra*, said:

> "It is permissible to make a bona fide valuation of goods. But even the most express contract to arbitrarily limit the liability of a common carrier for the results of negligence, which is but another form of contracting against liability in part for negligence, is prohibited as against public policy. The

provision in the receipt under consideration is not a valuation of the particular article to be shipped, but an effort to limit liability in case no valuation is made. It attempts, by means of a printed form of receipt prepared by it in advance, not to arrive at the actual value of any article, but to say that, in the absence of this, 'the shipper agrees that the value of said property is not more than $50 * * * and that the company shall not be liable in any event for more than * * * $50 if no value is stated herein.' It is not even stated that, in the absence of valuation, the value shall be fixed at $50, if that would do, but only that it is agreed that the value is 'not more than' that amount—whether that sum or less is left open. Likewise it states that the company shall not be liable 'for more than $50'—whether for that sum or less is not stated. How can it be said that an agreement which undertakes to fix neither the value nor the amount of the liability, but merely to put a limit upon them, is a bona fide valuation? It is plainly an agreement to limit liability, not to definitely fix value, and it is that which our statute and decisions declare cannot be done, as to the negligence of the carrier."

The court then took up the effect of the Interstate Commerce Act upon the contract in question, and said:

"The third question propounded inquiries as to the extent to which the case in hand is controlled or affected by the Interstate Commerce Act as amended in 1906, and especially by what is known as the 'Elkins' Act,' as amended in 1906, and whether, in view of the provisions of those acts of Congress, the

decision of this court in the case of Southern Express Co. v. Hanaw, *supra*, should be overruled or modified. To this question we respond that there is nothing in the acts of Congress mentioned in the question propounded which controls or affects the cases in hand, or which requires a modification or overruling of the decision cited. In Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct., 132, 48 L. Ed., 268 (decided in 1903), it was held that 'while Congress, under its power, may provide for contracts for interstate commerce, permitting the carrier to limit its liability to a stipulated valuation, it does not appear that Congress has up to the present time sanctioned contracts of this nature; and, in the absence of congressional legislation on the subject, a state may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their own negligence, a contract to the contrary notwithstanding. There is no difference in the application of a principle based on the manner in which a state required a degree of care and responsibility, whether enacted in a statute or resulting from the rules of law enforced in its courts.' In that case a horse was shipped from Albany, N. Y., to a point in Pennsylvania. The bill of lading contained a limitation of liability to a valuation of $100, which it was conceded would have been held valid in New York, but not in Pennsylvania. Suit was brought in the latter state, a recovery was had for $10,000, and this was sustained. We may assume, therefore, that the Interstate Commerce law, as it then stood, did not prevent the application of the state law to the validity of such agreements or to the right of recovery in spite of them."

The court then discusses the original act and the act of March 2, 1889, by which it was amended, and says:

"With these provisions in the law, the decision in Pennsylvania Railroad v. Hughes, *supra*, was rendered, and it was declared that they did not interfere with the administration of the state law in regard to prohibiting limitation of liability for losses arising from negligence.

What is commonly known as the Elkins act of February 19, 1903 (32 Stat. 847), had also been enacted before the decision mentioned above was rendered, though after the case arose. That act and the amendment of 1906 to the Interstate Commerce Act, to which the court of appeals calls attention (34 Stat. 584), did not serve to change the law in respect to contracts limiting liability, as declared in the decision above cited. They extended the provisions of the law. * * * It was declared that it should be unlawful for any person, persons or corporations to offer, grant, or give, or to solicit, accept or receive, any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the act, whereby any such property should by any device whatever be transported at a less rate than the tariffs published and filed. This amendment was somewhat broader than the original act and the amendment of 1889, but dealt with the prohibition of unjust discrimination. It did not permit a limitation by contract of the liability of a common carrier. On the contrary, so far as any intimation might be drawn from its terms, such intimation would be in opposition to permitting such contracts. They could easily be made devices for the

avoidance of the prohibitions made by Congress. It was argued that if the shipper, who failed to fill the blank in an express receipt left for the statement of the value, were permitted to recover the actual value of the property lost, it might be used as a means of avoiding the terms of the act. We think there would be much more danger of this if shippers and carriers were permitted to make contracts limiting liability without regard to actual value, or if carriers could accomplish the same result because of a printed form of receipt and the leaving unfilled of a blank for the insertion of the value, regardless of actual value. But whether or not the shipper, or the company, or both, may be subject to the penalties provided by the act, this does not prevent the shipper from recovering the value of his property lost by reason of the negligence of the carrier.

"By section 7 of the act of 1906 (34 Stat. 595), a common carrier receiving property for interstate transportation is required to issue a receipt or bill of lading therefor, and it is declared that the initial carrier shall be liable to the lawful holder thereof 'for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' It can hardly be contended that this provision authorized any limitation of liability by the

initial carrier which it did not previously have a right to make. It has been contended that the declaration that the initial carrier shall be liable for 'any loss or damaage caused by it or a connecting carrier cut off any pre-existing right, if there were any, to make a contract for the limitation of liability. But the majority of courts which have passed upon this question have held that the purpose of the act was to require the issuance of through bills of lading and to prevent the limitation of liability of the initial carrier to a loss occurring on its own line. Congress was doubtless aware of the conflicting decisions which had been made in regard to the right to limit liability of a common carrier by contract, especially for a loss occurring by a carrier's own negligence, and of the fact that there were different statutes on the subject. Apparently, lest there might be a claim that this section interfered with the pre-existing state laws, the last clause was added, distinctly providing that 'nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws.' Considering the act of 1906 as a whole, we are of the opinion that it did not confer upon a common carrier any right to limit its liability by contract; nor did it interfere with the status of the state laws and the right of recovery under them, as announced in Pennsylvania R. Co. v. Hughes, supra."

The Supreme Judicial Court of Massachusetts, in Hooker v. Boston & M. Ry. Co., *supra*, handed down September 6, 1911, through Rugg, J., said:

"Reasonable agreements in this regard are upheld. This is a subject about which the policy estab-

lished in the several states prevails since, as well as before, the enactment of the federal statutes. Hence, an agreement inserted in a bill of lading limiting liability, in case of loss, has been held invalid if contrary to the law of a state, even though made the basis of a contract of interstate carriage."

Again:

"The defendant seeks the protection of a federal statute. The decisions of the United States Supreme Court are controlling authority in this respect. The cases we have cited seem to decide, in principle, that the limitation of liability invoked by the defendant is not one which is under the aegis of the interstate commerce act. The subject is one which is not so related to rates of transportation of passengers as to be a part of such rate."

O'Connor v. Great Northern Ry. Co., June 14, 1912, *supra*, by the Supreme Court of Minnesota, quoted with approval Hooker v. Boston & M. Ry. Co., just cited, adding:

"Of course, as to the tariff rates, the published tariffs control, and it is not an open question whether these rates are just or reasonable; but we fail to see such a connection between these rates and the attempted limitation of the carrier's liability that the courts may not ascertain and determine the validity of the latter."

The Supreme Court of Tennessee, in Louisville & N. Ry. Co. v. Smith, *supra*, had before it a question concerning the effect of the Interstate Commerce law upon the state decisions with reference to the special contracts of carriers limiting their liability, and said, through Neil, J.:

"So much of the seventh instruction as refers to the interstate commerce law, act of February 4, 1887,

c. 104, 24 Stat. 379 (U. S. Comp. St., 1901, p. 3154) is immaterial, since that has no bearing upon the right of a state to refuse to enforce a special contract limiting the liability of a carrier though made in a foreign state. Pennsylvania Ry. Co. v. Hughes, 191 U. S. 477."

Deemer, J., for the Supreme Court of Iowa, in Cramer v. Chicago, R. I. & P. Ry. Co., supra, decided November 20, 1911, used this language:

> "We have no doubt of the power of Congress to legislate upon this matter of limiting liability, or to give full recognition and validity to such contracts; but counsel for appellants have failed to point out any act of Congress which does so. Our own reading of the Interstate Commerce Act fails to disclose any such provisions. It is not enough, as we think, that Congress has acted in the matter of interstate shipments and assumed control thereof. That had been done when the Solan and Hughes cases, supra, were announced. Definite action in recognition of such contracts as are relied upon was necessary. No such express legislation is found, and appellant is driven to the necessity of finding recognition of such contracts by implication."

CONCLUSION.

The State court held that the special contract, attempting to limit the carrier's liability and an arbitrary and unreasonable value of the cattle, without reference to the actual value, was void upon principles of general law. Further, that the provision limiting the time for bringing a suit for damages on account of the carrier's negligence to ninety days was void under the law of the forum, as

well as under the laws of Missouri. In Pennsylvania Railway v. Hughes, *supra*, it was expressly held that the interstate commerce act contains no provision authorizing special contracts by carriers, limiting their common law liability, and that the act contains nothing to prevent the states from enforcing their own statutes, or the rules laid down by their courts concerning the validity of such agreements. Mr. Justice Day, speaking for the court, said:

> "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carrier's from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuation, and until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriers."

No amendment to the interstate commerce act, since that decision, has been pointed out, giving the carrier power to exact from the shipper such contracts. It was for the State court to determine the applicatory law, and no Federal question was presented by the decision upon that point.

It is therefore submitted that the judgment of the State court must be upheld, and to that end that the writ of error should be dismissed, or the judgment affirmed, as the court may deem proper.

W. M. WILLIAMS,
J. A. L. WOLFE,
Attorneys for Defendants in Error.

V

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY v. HARRIMAN.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 121. Argued January 20, 1913.—Decided March 10, 1913.

Adams Express Co. v. Croninger, 226 U. S. 491, and *Kansas City Southern Ry. v. Carl*, *ante*, p. 639, followed to effect that the shipper who values his goods for the purpose of obtaining the lower of two duly published rates, based on valuation, is estopped from recovering a greater amount than his own valuation; and that the Carmack Amendment to the Hepburn Act of 1906 expresses the policy of Congress on this subject and supersedes all state legislation thereon.

It is not unreasonable, and in fact is the method approved by the Interstate Commerce Commission, in graduating freight according to value, to divide the particular subject of transportation into two classes—those above and those below a fixed amount; and the establishment of two cattle rates, one based on a maximum fixed value and the other on the actual value, is not a violation of the Carmack Amendment of the Hepburn Act.

The Carmack Amendment has withdrawn the determination of validity of all stipulations in interstate shipping contracts from state law and legislation. Under that amendment the validity of a provision that suit must be brought within a specified period is a Federal question to be settled by the general common law.

The liability imposed by the Carmack Amendment is that of the common law and it may be limited or qualified by a special contract with the shipper limiting it in a just and reasonable manner except exemption from loss or responsibility due to negligence; and so *held* as to a stipulation that suit be brought within ninety days from the happening of the loss.

Limitation of the time within which to bring actions is a usual and reasonable provision and there is nothing in the policy of the Carmack Amendment that is violated thereby.

THE facts, which involve the validity under the Carmack Amendment of a contract for interstate shipment of

live stock and a provision therein fixing the valuation
the shipment in case of loss in consideration of a lo
rate, are stated in the opinion.

Mr. Alex. S. Coke, *Mr. Joseph M. Bryson* and *Mr. C*
H. Smith for plaintiff in error submitted:

Under the act to regulate commerce a carrier may
its rates with reference to its liability, or the time wit
which suit shall be brought, in case of loss or damage,
creasing the rates where the liability is that fixed by co
mon law or the time for filing it is long and reducing th
where the liability is limited or the time within which
suit is short.

Where tariffs duly issued, filed and published cont
two rates for the shipment of cattle, one based upon
carrier's common-law liability with the statutory per
for filing suit and the other based upon a limited liabil
with a time less than that prescribed by the statute
suing, such provisions are binding upon the carrier and
shipper and must be observed by them both in the col
tion and payment of charges and in the adjustment
loss and damage claims. *Kansas City So. Ry. Co.
Albers Comm. Co.*, 223 U. S. 573; *N. Y., N. H. & H. R.
v. Int. Com. Comm.*, 200 U. S. 361, 391; *Armour Pa
ing Co. v. United States*, 209 U. S. 56; *Tex. & Pac. Ry.
v. Mugg*, 202 U. S. 242; *Louisville & Nash. R. R. Co.
Motley*, 219 U. S. 467; *Chi. & Alt. R. R. Co. v. Kirby*,
U. S. 155; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*,
U. S. 426.

The courts, whether state or Federal, have no powe
declare unreasonable the rates, rules or regulati
specified by a carrier in its tariffs unless the matter sh
first have been presented to the Interstate Comme
Commission. *Texas & P. Ry. Co. v. Abilene Cotton
Co.*, *supra*; *Robinson v. Balto. & O. R. R. Co.*, 222 U.
506; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 4

Int. Com. Comm. v. *Ill. Cent. Ry. Co.*, 215 U. S. 452; *Int. Com. Comm.* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88.

Where a carrier specifies two rates on cattle in its tariffs, one based upon its common-law liability and the other upon a limited liability fixed by the terms and conditions of its current live stock contract, such live stock contract, when properly executed, is valid, and the carrier's liability must be determined by its provisions.

There is nothing in the Carmack Amendment forbidding the basing of rates upon limited liability or prohibiting contracts limiting liability in consideration of reduced rates.

Prior to the statute of 11 Geo. IV, and 1 Wm. IV, c. 68, it was held that a carrier who had given notice that he would not be responsible for goods of greater value than five pounds, and in some cases ten pounds, unless the value was declared at the time of shipping, and the rate paid accordingly, would not be liable at all, even for the five pounds or the ten pounds, to a shipper who shipped a package of greater value, as an ordinary package, without disclosing its real value. *Gibbon* v. *Paynton*, 4 Burr. 2298; *Clay* v. *Willan*, 1 H. Bl. 298; *Isett* v. *Mountain*, 4 East, 371; *Batson* v. *Donovan*, 4 B. & Ald. 21.

Under the statute 11 Geo. IV, and 1 Wm. IV, c. 68, which required the shipper to give notice of the value if the value exceeded ten pounds, it was held that the carrier is not liable, even if the loss happens by the gross negligence of his servants, where a parcel of greater value than ten pounds is delivered without declaring its value and paying the rate according to value. *Hinton* v. *Dibbin*, 2 Ad. & E. N. S. 646.

Long prior to the passage of the Carmack Amendment it was held that a contract fairly made, agreeing on the valuation of the property carried with the freight rate based on an assumption by the carrier of liability only to the extent of the agreed valuation, even where the loss

resulted from the negligence of the carrier, would be upheld. *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331. This rule has also been followed in *Kidd* v. *Greenwich Insurance Co.*, 35 Fed. Rep. 351; *Calderon* v. *Atlas Steamship Co.*, 64 Fed. Rep. 874; *S. C.*, 69 Fed. Rep. 574; *The Kensington*, 88 Fed. Rep. 331; *Jennings* v. *Smith*, 106 Fed. Rep. 139; *Saunders* v. *Southern Railway*, 128 Fed. Rep. 15; *Macfarlane* v. *Adams Express Co.*, 137 Fed. Rep. 982; *Missouri &c. Ry. of Texas* v. *Patrick*, 144 Fed. Rep. 632; *Taylor* v. *Weir*, 162 Fed. Rep. 585; *Blackwell* v. *Southern Pac. Co.*, 184 Fed. Rep. 489; *Pierce Co.* v. *Wells-Fargo Co.*, 189 Fed. Rep. 561; and approved in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442; *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272; *The Kensington*, 183 U. S. 263, and *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477.

For the cases in the state courts of last resort adopting the rule in the *Hart Case*, see *Alair* v. *Railroad Company*, 53 Minnesota, 160; *Douglas Co.* v. *Railway Co.*, 62 Minnesota, 288; *O'Malley* v. *Railway Co.*, 86 Minnesota, 380; *Loeser* v. *Chicago, M. & St. P. Ry. Co.*, 94 Wisconsin, 571; *Ullman* v. *Chicago &c. Ry. Co.*, 112 Wisconsin, 150; *Baltimore & Ohio Ry. Co.* v. *Hubbard*, 72 Oh. St. 302.

The main purpose of the Carmack Amendment was to give the holder of the bill of lading a right of action against the initial carrier for loss caused by connecting carriers, but it also creates a cause of action against the initial line which is in the nature of a right created by Federal law to take the place of rights prior thereto existing under the common law or under state enactments. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *So. Pac. Ry. Co.* v. *Crenshaw*, 63 S. E. Rep. 865.

The amendment has been frequently construed by state courts and by inferior Federal courts as not prohibiting agreements of the kind in question. *Greenwald* v. *Weir*, 199 N. Y. 170; *Bernard* v. *Adams Express Co.*, 205 Massachusetts, 254; *Travis* v. *Wells-Fargo*, 79 N. J. L. 83; *P. C.*

C. & St. L. Ry. Co. v. *Mitchell* (Ind.), 91 N. E. Rep. 735; *Larsen* v. *Oregon S. L. R. Co.* (Utah), 110 Pac. Rep. 983; *Frye* v. *Southern P. Ry. Co.*, 247 Illinois, 564; *Fielder* v. *Express Co.* (W. Va.), 71 S. E. Rep. 99.

For cases under the Harter Act, 27 Stat. 445, see *Calderon* v. *Atlas S. S. Co.*, 64 Fed. Rep. 874; aff'd 69 Fed. Rep. 574; *id.* 170 U. S. 272.

Many States having statutory provisions restricting the right of common carriers to limit their liability by contract, nevertheless apply the rule of the *Hart Case*. *D'Arcy* v. *Adams Express Co.*, 162 Michigan, 363; *Alair* v. *Railroad Co.*, 53 Minnesota, 160; *Douglas Co.* v. *Railway Co.*, 62 Minnesota, 288; *Oppenheimer* v. *U. S. Express Co.*, 69 Illinois, 62: *Johnstone* v. *Richmond & D. R. Co.*, 39 So. Car. 55.

No law or public policy of a State can serve to set aside or change the rates, rules and regulations of a carrier affecting interstate commerce specified in its duly issued, filed and published tariffs. *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1.

Congress has rightfully assumed jurisdiction of the subject-matter, and therefore state laws covering the same must yield. *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S. 444; *Nor. Pac. Ry. Co.* v. *Washington*, 222 U. S. 370; *G., C. & S. F. Ry. Co.* v. *Hefley*, 158 U. S. 98.

Congress has so taken possession of the field of interstate commerce as to render inoperative state laws governing liability where the liability is a matter of contract based upon tariff provisions, in consideration of which the shipper was given a reduced rate.

The finding of the state court that in this case there was in fact no reduction in the rate at which the cattle were to be carried and no consideration for the limitation, in the face of uncontradicted testimony showing that plaintiff in error did have two rates for the shipment of cattle and that defendants in error obtained the benefit of the

lower rate, which they could obtain only by executing the contract limiting plaintiff in error's liability, is not binding upon this court, but it will look to the whole testimony to determine for itself what the fact is. *K. C. So. Ry. Co.* v. *C. H. Albers Comm. Co.*, 223 U. S. 573.

To so construe the Carmack Amendment as to leave state regulations in force concurrently with the regulations of Congress would permit discrimination and leave uncertainty in a field where Congress clearly intended there should be no discrimination and no uncertainty. *C., M. &c. Ry. Co.* v. *Solan*, 169 U. S. 133, and *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477, distinguished.

Defendants in error, in declaring the value of their cattle at less than their true value for the purpose of securing a lower rate than they would have been charged had the true value been declared, were guilty of an unlawful act, under the Act to Regulate Commerce and the Elkins Act, and they cannot maintain a suit based upon such transaction. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Ellison* v. *Adams Express Co.*, 245 Illinois, 410.

A transaction in violation of a penal statute cannot be the basis of judicial action, unless the statute manifests an intention not to limit its scope to the exaction of the penalty. *Miller* v. *Ammon*, 145 U. S. 421; *Brown* v. *Turkington*, 3 Wall. 377; *Hanauer* v. *Doane*, 12 Wall. 342; *The Florida*, 101 U. S. 37; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396; *McMullin* v. *Hoffman*, 174 U. S. 639; *Harriman* v. *Northern Securities Co.*, 197 U. S. 244.

Mr. William M. Williams, with whom *Mr. J. A. L. Wolfe* was on the brief, for defendants in error:

A carrier may fix its rates for interstate shipments with reference to the service to be performed, and may adopt rules and regulations concerning the same; but a shipper will not be bound by a contract, which is invalid and prohibited by law, simply because the rate collected is con-

ditioned upon the signing of such void agreement. *Dray & Kahn Glass Co.* v. *Missouri Pacific Ry. Co.* (Mo. App.), 136 S. W. Rep. 757; *O'Connor* v. *Great Northern Ry. Co.* (Minn.), 136 N. W. Rep. 743; *Hooker* v. *Boston R. Co.* (Mass.), 95 N. E. Rep. 945; *Adams Ex. Co.* v. *Mellinchamp* (Ga.), 75 S. E. Rep. 600; *Cramer* v. *Chicago, R. I. & P. Ry. Co.* (Iowa), 133 N. W. Rep. 387.

The Interstate Commerce Act was intended primarily to regulate rates. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences and to prevent special and secret agreements in respect of rates for transportation. *Kansas City S. R. Co.* v. *Albers Com. Co.*, 223 U. S. 573.

The record does not show that the live stock contract was ever filed with the Interstate Commerce Commission, or that any tariff sheet so filed contained the rules and regulations relied on in this case.

Defendants in error did not misrepresent the value of their cattle for the purpose of obtaining a lower freight rate than they would have secured if the true value had been known.

Upon the general and local applicatory law, the special contract, attempting to limit the carrier's liability for its own negligence, and fixing an arbitrary and unreasonable value upon the cattle, was void. There is nothing in the Interstate Commerce Act to prevent a state court from enforcing its own rules upon this subject, and a judgment based upon the state law as contained in its statutes or decisions raises no Federal question. *Pennsylvania Ry. Co.* v. *Hughes*, 191 U. S. 477; *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133; *Savage* v. *Jones*, 225 U. S. 551.

For cases in the state courts as to the effect of the Interstate Commerce Act and the decision in the *Hughes Case*, *supra*, see *Adams Express Co.* v. *Mellinchamp*, 75

S. E. Rep. 596; *Southern Express Co.* v. *Hanna*, 134 Georgia, 445; *O'Connor* v. *Great Northern R. Co.*, 136 N. W. Rep. 743; *Hooker* v. *Boston & M. R. Co.*, 95 N. E. Rep. 945; *Louisville & N. R. Co.* v. *Smith*, 134 S. W. Rep. 866; *Cramer* v. *Chicago, R. I. & P. R. Co.*, 133 N. W. Rep. 387. See also *Latta* v. *Chicago, St. P. & M. R. Co.*, 172 Fed. Rep. 850.

MR. JUSTICE LURTON delivered the opinion of the court.

This was an action in a state court of Texas by a shipper of cattle, under a special live-stock transportation contract for a shipment from a point in Missouri to a point in Oklahoma, to recover the value of cattle killed by a negligent derailment occurring in the former State. The shipment consisted of four bulls and thirteen cows, claimed to have been very valuable "show cattle." They were all killed, and plaintiffs recovered their full value, $10,640, and this judgment was affirmed by the court below.

As the transaction was an interstate shipment the case comes here upon questions which involve the validity of certain provisions in the contract of shipment when tested by the twentieth section of the Act to Regulate Commerce, as amended by the act of June 29, 1906 (34 Stat. 584, c. 3591).

Aside from the question of negligence, which we assume to be closed by the verdict and judgment in the state court, the defenses pressed here are, first, that the limitation of value in case of loss or damage to thirty dollars for each bull and twenty dollars for each cow, was a valid declaration of the valuation upon which the rate was based; and, second, that the action was not brought within ninety days after damage sustained, both being stipulations found in the shipping contract.

Those provisions in the contract which directly relate to the questions stated are as follows:

The title at the head of the contract is,—

"RULES AND REGULATIONS FOR THE TRANSPORTATION OF LIVE STOCK.

NOTICE.

This Company has two rates on live stock."

Then follows a paragraph in these words:

"Ordinary Live Stock transported under this special contract is accepted and hauled at rate named below at owner's risk, as per conditions herein set forth, with the distinct understanding that said rate is a special rate, which is hereby agreed to, accepted and understood to be at less than published tariff rate applying thereon when transported at carrier's risk.

"All Kinds of Live Stock, Carrier's Risk, will be taken under the provisions and at rates provided for by existing tariffs and classification."

Then follows the contract described as "Special Live Stock Contract No. 4. Executed at Pilot Grove Station, 1-30-1907."

Passing over a number of provisions concerning the agreement upon the part of the carrier, and a number of things which the shipper assumes to do, we come to § 8, which is in these words:

"8. The carrier does not ship live stock or Emigrant Outfit under this contract or at the rate hereon given upon which its liability in case of any loss or injury, shall exceed the following prices per head:

Each horse, (gelding, mare, stallion mule or jack)	$100.00
Each pony or range horse	30.00
Each Ox, Steer or bull	30.00
Each cow	20.00
Each calf or hog	7.00
Each sheep or goat	2.00

"Emigrant Outfit (not live stock) consisting of Emigrant Movables, Household Goods, Second-hand Farm

Machinery, etc., when loaded with live stock, as per classification at valuation not to exceed $5.00 per 100 pounds in case of loss or damage, and said shipper represents and agrees that his said live stock or emigrant outfit do not exceed in value those prices, and in case of any loss or damage thereto, by carrier's negligent transportation, or handling of said cars as aforesaid, it is mutually agreed, in consideration of the rate named, and which is less than the rate applying on shipments at carrier's risk, the shipper shall be entitled to recover only actual damages, but in no instance more than the stipulated valuation shown above."

The provision of the published tariff sheet referred to in the contract is set out in the margin, preceded by the offer of counsel to file it in evidence.[1] By a clause in the ninth

[1] Mr. Head: We offer the following portions of I. C. C. tariff No. A-1636, M. K. & T. Local Distance Tariff No. 2548 applying on classes and commodities:

MISSOURI, KANSAS & TEXAS RAILWAY CO.
THE 'KATY' ROUTE.
Local Distance Tariff No. 2548.
(Cancels No. 737.)

Applying on classes and commodities between stations on the Missouri, Kansas & Texas Ry. as follows:

Between Stations in	And Stations in
Indian Territory	Oklahoma Territory
Missouri or Kansas	Indian Territory
Missouri or Kansas	Oklahoma Territory

And locally between Stations in the Indian or Oklahoma Territories.

Rates in Cents Per 100 lbs.

CATTLE (See Rule 3)

Distance	Commodities	Carloads.
390 miles and over 370		26½

Rule 3.

LIVE STOCK—Continued.

Limitation of Liability.—Rates provided on Live Stock will apply only on shipments made at Owner's Risk, with limitation of liability on the part of the railroad company as common carrier under the terms and conditions of the current Live Stock contract provided by this

section of the contract under which the cattle were shipped it is stipulated that "no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occur, after the lapse of 90 days from the happening thereof, any statute or limitation to the contrary notwithstanding."

In respect of the two stipulations just referred to, the trial judge charged the jury as follows:

"The contract of shipment in this case contains among other things, a stipulation that suit for any damages growing out of this shipment must be commenced within ninety days. You are instructed that such stipulation is void and not binding upon the plaintiffs herein.

"Said contract also contains a stipulation to the effect that if the cattle in the shipment are lost or killed, that their owners can only recover a certain fixed amount, which amount is named in said contract. You are instructed that such stipulation is void and not binding upon plaintiffs in this case, and if you should find for plaintiffs, you will fix the amount of their damages under instructions hereinafter given you."

This charge was approved upon appeal and the judgment affirmed. The ground upon which the charge in respect to the limitation of recovery in case of loss was based was first, that every such contract, where the loss was due to negligence, was null and void under the law and public policy of the State; and, second, that it was a contract of exemption forbidden by the Hepburn Act of June 29, 1906, being the Carmack Amendment of the

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company, the contract to be first duly executed in manner and form provided therein.

120 per cent. of the rates named in this tariff will be charged on shipments made without limitations of carrier's liability at common law and under this status, shippers will have the choice of executing and accepting contracts for shipments of Live Stock with or without limitation of liability, the rates to be made as provided for herein.

twentieth section of the general act to regulate commerce of February 4, 1887. (24 Stat. 379, c. 104.)

That the shipper had the choice of two rates, one twenty per cent. higher than the other, upon this shipment, is shown by the provisions of the shipping contract and the tariff sheets referred to therein. That the difference between the two rates was not unreasonable, the one when the cattle were not valued and the other when their value was declared, is to be assumed from the acceptance of the rates as filed with the Commission. That the "portion" of the rate sheets in evidence does not include the "Current Live Stock Contract" referred to in the part filed, is of no vital significance. The objection was not made below. The case was proceeded with in the state court upon the hypothesis that the "Current Live Stock Contract," referred to in the "portion" of the rate sheets actually in evidence, was the live stock contract executed by the parties, and had been duly filed as part of the rate sheets. It is too late to make an objection here which, if made below, might have been remedied by filing all instead of a "portion" of the filed tariff. *Texas & P. Railway* v. *Abilene Oil Co.*, 204 U. S. 426. In any event the rate sheets do provide for a choice between two rates, one with and one without a declared valuation. In one case the carrier is liable for whatever loss or damage the shipper sustains and in the other its liability is limited to the valuation upon which the rate was based. The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in *Adams Express Company* v. *Croninger*, 226 U. S. 491, and *Kansas City Southern Railway* v. *Carl*, just decided, that we only need to refer to the opinions in those cases without further elaboration.

That the trial court and the Court of Civil Appeals

erred in holding this stipulation null and void because forbidden by either the law or policy of the State of Texas, or by the twentieth section of the act of June 29, 1906, is no longer an open question since the decisions of this court in the cases just referred to.

Nor is there anything upon the face of this contract, when read in connection with the rate sheets referred to therein, (of which the defendants in error were compelled to take notice not only because referred to in the contract signed by them, but because they had been lawfully filed and published), which offends against the provisions of the twentieth section of the act of June 29, 1906.

Neither is the valuation of cattle at thirty and twenty dollars per head subject to impeachment as upon its face arbitrary and unreasonable. The valuation in this case was made by the consignor himself. The contract upon this point reads, "And said shipper represents and agrees that his said live stock . . . do not exceed in value those prices," referring to the schedule set out immediately above that declaration. That the cattle were not other than average or ordinary cattle of no peculiar value as "show cattle," or otherwise, is indicated by the character of the printed form of contract signed by the consignor. After reciting that the company had two rates on live stock, it proceeds,—"Ordinary live stock transported under this special contract," etc.

The contract here involved is substantially identical with the contract and schedule upheld in *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, where the transportation was "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: 'If horses or mules, not exceeding two hundred dollars each. If cattle or cows, not exceeding seventy-five dollars each.'"

In the case at bar it has been said that the shipper was not asked to state the value, but only signed the contract

handed to him and made no declaration. But the same point was made in the *Hart Case*, when the court said (p. 337):

"A distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

It is said that the contract in the case at bar includes a valuation of all bulls and all cows at the same sum, and that this is arbitrary and not the result of any real effort to value the particular bulls and cows to be transported. But the same objection applied to the contract in the *Hart Case*, where horses were valued at the same maximum value and other cattle at the same fixed sum. But here, as there, it is plain that all animals, horses and other cattle, have not a fixed value, and so, the contract fixes "a graduated value according to the nature of the animal."

It is not unreasonable for the purpose of graduating freight according to value to divide the particular subject of transportation into two classes, those above and those below a fixed maximum amount. No other method is practicable, and this is a method administratively approved by the Commerce Commission.

That the value of the cattle shipped under this valuation did greatly exceed the valuation therein represented, may

be true. It only serves to show that the shipper obtained a lower rate than he was lawfully entitled to have by a misrepresentation. It is neither just nor equitable that he shall benefit by the lower rate, and then recover for a value which he said did not exist, in order to obtain that rate. Having obtained a rate based upon the declared value, he is concluded, and there is no room for parol evidence to show otherwise. *Hart* v. *Pennsylvania Railroad* and *Kansas City &c. Railroad* v. *Carl*, *supra*.

When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903 (32 Stat. 847, c. 708). *Texas & P. Railway* v. *Mugg*, 202 U. S. 242; *Chicago & A. Railway* v. *Kirby*, 225 U. S. 155. The particular cattle were loaded by the shipper and were never seen by the company's agent. Neither was it claimed that he was informed of the value or quality of the cattle to be shipped. We see no ground upon which this contract can be held upon its face to have offended against the statute.

The court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, "any statute or limitation to the contrary notwithstanding," was void.

It is conceded that there are statutes in Missouri, the State of the making of the contract, and the State in which the loss and damage occurred, and in Texas, the State of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability

in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract was brought within the statutory period of both States.

The liability sought to be enforced is the "liability" of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Michigan Central Railroad* v. *Vreeland*, *ante*, p. 59. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. *Adams Express Company* v. *Croninger*, and *Michigan Central Railroad* v. *Vreeland*, cited above; *York Co.* v. *Central Railroad Co.*, 3 Wall. 107; *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Express Company* v. *Caldwell*, 21 Wall. 264, 267; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331.

The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. *Riddlesbarger* v. *Hartford*

Insurance Co., 7 Wall. 386. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in *Express Company* v. *Caldwell*, 21 Wall. 264. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: *Central Vermont Railroad* v. *Soper* (1st C. C. A.), 59 Fed. Rep. 879; *Ginn* v. *Ogdensburg Transit Co.* (7th C. C. A.), 85 Fed. Rep. 985; *Cox* v. *Central Vermont Railroad*, 170 Massachusetts, 129; *North British &c. Insurance Co.* v. *Central Vermont Railroad*, 9 App. Div. (N. Y.) 4, aff'd 158 N. Y. 726. Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable. *McCarty* v. *Gulf &c. Ry.*, 79 Texas, 33; *Thompson* v. *Chicago &c. Ry.*, 22 Mo. App. 321. See cases to same effect cited in 6 Cyc., p. 508. The provision requiring suit to be brought within ninety days is not unreasonable.

For the errors indicated, the judgment must be reversed for such further proceedings as may be consistent with this opinion.

MR. JUSTICE HUGHES concurs in the result. MR. JUSTICE PITNEY dissents.